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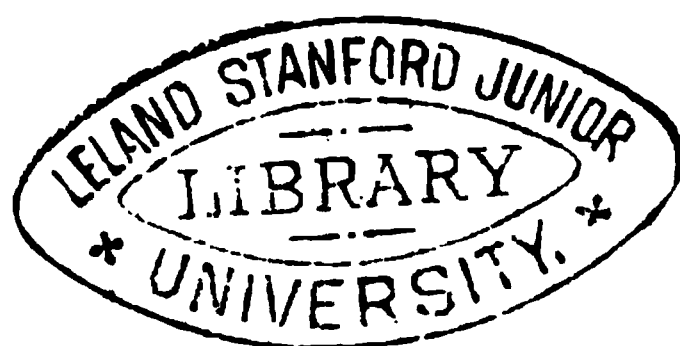
A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

JAS. M. KERR, EDITOR.

WM. M. McKINNEY, ASSOCIATE EDITOR.

VOL. XXIV.

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TABLE

OF THE CASES REPORTED.

	PAGE		PAGE
Adamson, Indiana, Bloomington & W. R. Co. <i>v.</i>	127	Carlson <i>v.</i> Oceanic Steam Nav. Co.	215
Allerton <i>v.</i> Boston & Maine R. Co.	563	Central R. Co. of New Jersey, New Fruit Exchange <i>v.</i>	592
Atchison, Topeka & S. F. R. Co. <i>v.</i> Gants	290	Central Pac. R. Co., Martin <i>v.</i>	612
Atchison, Topeka & S. F. R. Co. <i>v.</i> Johns	480	Central Pass. R. Co., Winnegar <i>v.</i> ..	462
Atchison, Topeka & S. F. R. Co., Maxwell <i>v.</i>	574	Central Railroad & Banking Co. <i>v.</i> Smith	1
Atchison, Topeka & S. F. R. Co., Sachrowitz <i>v.</i>	382	Central Railroad & Banking Co., Smith <i>v.</i>	456
Augusta & Summerville R. Co. <i>v.</i> Randall	439	Central R. & Banking Co., Stevens <i>v.</i>	413
Bates <i>v.</i> Old Colony R. Co.	355	Chapin, People <i>ex rel.</i> New York, O. & W. R. Co. <i>v.</i>	136
Battishill <i>v.</i> Humphreys	69	Cheshire R. Co., Bucher <i>v.</i>	389
Beidelman, Dow <i>v.</i>	322	Chicago & Northwestern R. Co., Business Men's Assoc. <i>v.</i>	711
Black <i>v.</i> Brooklyn City R. Co.	526	Chicago & Northwestern R. Co., Fick <i>v.</i>	378
Blumenthal <i>v.</i> Maine Cent. R. Co.	247	Chicago & Northwestern R. Co., Quackenbush <i>v.</i>	545
Boozar, Houston & Texas Cent. R. Co. <i>v.</i>	63	Chicago, Burlington & Pac. R. Co., Templin <i>v.</i>	107
Boston & Maine R. Co., Allerton <i>v.</i> ..	563	Chicago, Burlington & Q. R. Co., Lincoln Board of Trade <i>v.</i>	583
Boston & Maine R. Co. <i>v.</i> Chipman ..	336	Chicago, Burlington & Q. R. Co., Pershing <i>v.</i>	405
Boston & Providence R. Co., Stewart <i>v.</i>	499	Chicago, Burlington & Q. R. Co. <i>v.</i> Schoffer	174
Brady <i>v.</i> Pennsylvania R. Co.	603	Chicago, Milwaukee & St. P. R. Co., Pattee <i>v.</i>	399
Breen <i>v.</i> New York Cent. & H. R. Co.	523	Chicago, Milwaukee & St. P. R. Co., Schilling <i>v.</i>	60
Brooklyn City R. Co., Black <i>v.</i>	526	Chicago, Rock Island & Pac. R. Co., Way <i>v.</i>	286
Brooklyn City R. Co., Donnelly <i>v.</i> ..	103	Chicago, St. Paul, M. & O. R. Co., Business Men's Assoc. <i>v.</i>	724
Broussard, Sabine & East Texas R. Co. <i>v.</i>	199	Chicago, St. Paul M. & O. R. Co., Mykleby <i>v.</i>	387
Bucher <i>v.</i> Cheshire R. Co.	389	Chipman, Boston & Maine R. Co. <i>v.</i> ..	336
Bunch, Great Western R. Co. <i>v.</i>	224	Cincinnati Southern R. Co., Campbell <i>v.</i>	113
Burlington, Cedar Rapids & N. R. Co., Graham <i>v.</i>	397	City of Minneapolis, State <i>ex rel.</i> <i>v.</i> St. Paul, Minneapolis & M. R. Co.	168
Burlington & Missouri R. R. Co., Lincoln Board of Trade <i>v.</i>	583	City R. Co. <i>v.</i> Lee	566
Business Men's Assoc. <i>v.</i> Chicago & Northwestern R. Co.	711	Cornell, Jardine <i>v.</i>	307
Business Men's Assoc. <i>v.</i> Chicago, St. Paul, M. & O. R. Co.	724		
Butler <i>v.</i> White Water V. R. Co.	467		
Campbell <i>v.</i> Trustees Cincinnati Southern R. Co.	113		
Cape Fear & Y. V. R. Co., Troy <i>v.</i> ..	13		

	PAGE		PAGE
Covington <i>v.</i> Western & Atlantic R. Co.....	469	Hobbs <i>v.</i> Texas & Pacific R. Co....	268
Davis, Philadelphia, Wilmington & Balt. R. Co. <i>v.</i>	143	Houston & Texas Cent. R. Co. <i>v.</i> Boozer.....	63
Denver, South Park & P. R. Co., Kennedy <i>v.</i>	40	Houston & Texas Cent. R. Co. <i>v.</i> Hill.....	363
Donnegan, Louisville, Evansville & St. L. R. Co. <i>v.</i>	116	Houston & Texas Cent. R. Co. <i>v.</i> Lee.....	452
Donnelly <i>v.</i> Brooklyn City R. Co..	103	Houston <i>v.</i> Vicksburg, Shreveport & P. R. Co.....	76
Dougherty <i>v.</i> Missouri R. Co.....	488	Hughes <i>v.</i> Galveston, Houston & S. A. R. Co.....	66
Dow <i>v.</i> Beidelman.....	322	Humphreys, Baltishill <i>v.</i>	69
Dunden, Union Pac. R. Co. <i>v.</i>	88	Hungerford, State <i>v.</i>	265
East Line & Red River R. Co. <i>v.</i> Rushing.....	367	Hurlburt <i>v.</i> Lake Shore & M. S. R. Co.....	596
Ehrman, Pullman Palace Car Co. <i>v.</i>	362	Hurt <i>v.</i> St. Louis, Iron Mountain & S. R. Co.....	422
Fick <i>v.</i> Chicago & Northwestern R. Co.....	378	Indiana, Bloomington & W. R. Co. <i>v.</i> Adamson.....	127
Fitchburg R. Co., Maguire <i>v.</i>	9	International & Great Northern R. Co. <i>v.</i> Underwood.....	570
Gainesville Street R. Co., Hays <i>v.</i>	97	International & Great Northern R. Co. <i>v.</i> Wilkes.....	331
Galveston, Houston & S. A. R. Co., Hughes <i>v.</i>	66	Isley, North Hudson County St. R. Co. <i>v.</i>	94
Galveston, Houston & S. A. R. Co. <i>v.</i> Ryon.....	30	Jardine <i>v.</i> Cornell.....	307
Gants, Atchison, Topeka & S. F. R. Co. <i>v.</i>	290	Johns, Atchison, Topeka & S. F. R. Co. <i>v.</i>	480
Gascamp, Gulf, Colorado & S. F. R. Co. <i>v.</i>	6	Jones, Louisville & Nashville R. Co. <i>v.</i>	417
Graham <i>v.</i> Burlington, Cedar Rapids & N. R. Co.....	397	Kansas City, Ft. Scott & G. R. Co. <i>v.</i> Kelley.....	281
Graville <i>v.</i> Manhattan R. Co.....	375	Kansas City, St. Joseph & C. B. R. Co. <i>v.</i> Rudebach ..	219
Great Western R. Co. <i>v.</i> Bunch...	224	Kelley, Kansas City, Ft. Scott & G. R. Co. <i>v.</i>	281
Greenville L. & S. R. Co., Waldrop <i>v.</i>	204	Kennedy, Denver, South Park & P. R. Co. <i>v.</i>	40
Guenther <i>v.</i> St. Louis, Iron Mountain & S. R. Co.....	47	Kentucky & Indiana Bridge Co. <i>v.</i> Louisville and Nashville R. Co..	630
Gulf, Colorado & S. F. R. Co. <i>v.</i> Gascamp.....	6	Lake Shore & Michigan Southern R. Co., Hurlburt <i>v.</i>	596
Gulf, Colorado & S. F. R. Co. <i>v.</i> McGowan.....	210	Lake Shore & Michigan Southern R. Co., Scofield <i>v.</i>	685
Gulf, Colorado & S. F. R. Co. <i>v.</i> Mannewitz.....	428	Lakin <i>v.</i> Oregon Pac. R. Co.....	500
Gulf, Colorado & S. F. R. Co. <i>v.</i> Pool.....	187	Lee, City R. Co. <i>v.</i>	566
Hall <i>v.</i> South Carolina R. Co.....	311	Lee, Houston & Tex. Cent. R. Co. <i>v.</i>	452
Hannibal & St. Joseph R. Co. <i>v.</i> Missouri River Packet Co.....	157	Lincoln Board of Trade <i>v.</i> Burlington & M. R. R. Co.....	583
Hannibal & St. Jo. R. Co., Reilly <i>v.</i>	81	Louisville & Nashville R. Co. <i>v.</i> Jones....	417
Hardenbergh <i>v.</i> St. Paul, Minneapolis & M. R. Co.....	359	Louisville & Nashville R. Co., Kentucky & Indiana Bridge Co. <i>v.</i> ...	630
Hayman <i>v.</i> Pennsylvania R. Co....	478	Louisville & Nashville R. Co., Nichols <i>v.</i>	37
Hays <i>v.</i> Gainesville Street R. Co..	97	Louisville, Evansville & St. L. R. Co. <i>v.</i> Donnegan.....	116
Hecht, Ohio & Mississippi R. Co. <i>v.</i>	447	Louisville, New Orleans & T. R. Co., Reary <i>v.</i>	277
Hereford <i>v.</i> Southern Pac. R. Co..	133	Maguire <i>v.</i> Fitchburg R. Co.....	9
Herkimer & Mohawk St. R. Co., Webber <i>v.</i>	580		
Higgs, Topeka City R. Co. <i>v.</i>	529		
Hill, Houston & Texas Cent. R. Co. <i>v.</i>	363		
Hill <i>v.</i> Ninth Avenue St. R. Co....	522		
Hinsdale, Southern Kan. R. Co. <i>v.</i>	256		

TABLE OF CASES REPORTED.

V

	PAGE		PAGE
Maine Cent. R. Co., Blumenthal <i>v.</i>	247	Quackenbush <i>v.</i> Chicago & North-	
Manhattan R. Co., Graville <i>v.</i>	375	western R. Co.	545
Mannewitz, Gulf, Colorado & S. F.		Randall, Augusta & Summerville	
R. Co. <i>v.</i>	428	R. Co. <i>v.</i>	439
McCoy, Terre Haute & Indianapolis		Reary <i>v.</i> Louisville, New Orleans	
R. Co. <i>v.</i>	212	& T. R. Co.	277
McGowan, Gulf, Colorado & S. F.		Reilly <i>v.</i> Hannibal & St. Jo. R. Co..	81
R. Co. <i>v.</i>	210	Rice, Southern Kansas R. Co. <i>v.</i> ...	316
Martin <i>v.</i> Southern Pac. R. Co....	612	Richmond & Danville R. Co., Por-	
Maxwell <i>v.</i> Atchison, Topeka & S.		ter <i>v.</i>	137
F. R. Co.	574	Richmond & Danville R. Co.,	
Missouri R. Co., Dougherty <i>v.</i>	488	Smith <i>v.</i>	557
Missouri River Packet Co., Hanni-		Roach, Virginia Midland R. Co. <i>v.</i> ..	271
bal & St. Jo. R. Co. <i>v.</i>	157	Robostelli <i>v.</i> New York & Hartford	
Mosher <i>v.</i> St. Louis, Iron Mountain		R. Co.	515
& S. R. Co.	339	Rosenbaum <i>v.</i> St. Paul & Duluth	
Mykleby <i>v.</i> Chicago, St. Paul, M.		R. Co.	274
& O. R. Co.	387	Rudebach, Kansas City, St. Jo. &	
New Fruit Exchange <i>v.</i> Central		C. B. R. Co. <i>v.</i>	219
R. Co. of New Jersey.....	592	Rushing, East Line & Red River	
New York & Hartford R. Co., Ro-		R. Co. <i>v.</i>	367
bostelli <i>v.</i>	515	Ryon, Galveston, Houston & S. A.	
New York Central & Hudson R.		R. Co. <i>v.</i>	30
R. Co., Breen <i>v.</i>	523	Sabine & East Texas R. Co. <i>v.</i>	
New York Central & H. R. R. Co.,		Broussard.....	199
Ulrich <i>v.</i>	350	Sabine & East Texas R. Co. <i>v.</i>	
New York, Ontario & W. R. Co.,		Wood.....	190
Chapin <i>v.</i>	136	Sachrowitz <i>v.</i> Atchison, Topeka &	
Nichols <i>v.</i> Louisville & Nashville		S. F. R. Co.	382
R. Co.	37	St. Louis, Iron Mountain & S.	
Ninth Avenue St. R. Co., Hill <i>v.</i> ...	522	R. Co., Guenther <i>v.</i>	47
North Hudson County St. R. Co. <i>v.</i>		St. Louis, Iron Mountain & S.	
Isley.....	94	R. Co., Hurt <i>v.</i>	422
Oceanic Steam Nav. Co., Carlson <i>v.</i>	215	St. Louis, Iron Mountain & S.	
Ohio & Mississippi R. Co. <i>v.</i> Hecht.	447	R. Co., Mosher <i>v.</i>	339
Ohio & Miss. R. Co. <i>v.</i> Wochter..	194	St. Paul & Duluth R. Co., Rosen-	
Old Colony R. Co., Bates <i>v.</i>	355	baum <i>v.</i>	274
Olson <i>v.</i> St. Paul, Minneapolis &		St. Paul, Minneapolis & M. R. Co.,	
M. R. Co. (Two Cases).....	152, 154	Hardenbergh <i>v.</i>	359
Omaha & Republican Valley R. Co.		St. Paul, Minneapolis & M. R. Co.,	
<i>v.</i> Standen.....	179	Olson <i>v.</i> (two cases).....	152, 154
Orbann, Philadelphia Traction Co. <i>v.</i>	432	St. Paul, Minneapolis & M. R. Co.,	
Oregon Pacific R. Co., Lakin <i>v.</i> ...	500	State <i>ex rel.</i> City of Minneapolis <i>v.</i>	168
Pattee <i>v.</i> Chicago, Milwaukee &		Schaffer, Chicago, Burlington &	
St. P. R. Co.	399	Q. R. Co. <i>v.</i>	174
Pennsylvania R. Co., Brady <i>v.</i> ..	603	Schilling <i>v.</i> Chicago, Milwaukee &	
Pennsylvania R. Co., Hayman <i>v.</i> ..	478	St. P. R. Co.	60
People, <i>ex rel.</i> New York, O. & W.		Scofield <i>v.</i> Lake Shore & Michigan	
R. Co. <i>v.</i> Chapin.....	136	Southern R. Co.	685
Pershing <i>v.</i> Chicago, Burlington &		Seaboard & Roanoke R. Co., Tay-	
Q. R. Co.	405	lor <i>v.</i>	344
Philadelphia Traction Co. <i>v.</i> Orbann.	432	Smith, Cent. R. & Banking Co. <i>v.</i>	1
Philadelphia, Wilmington & Balt.		Smith <i>v.</i> Cent. R. & Banking Co..	456
R. Co. <i>v.</i> Davis.....	143	Smith <i>v.</i> Richmond & Danville	
Pollock, Pullman Palace Car Co. <i>v.</i>	217	R. Co.	557
Pool, Gulf, Colo. & S. F. R. Co. <i>v.</i> ...	187	South Carolina R. Co., Hall <i>v.</i>	311
Porter <i>v.</i> Richmond & Danville		South Side Pass. R. Co. <i>v.</i> Trich..	549
R. Co. <i>v.</i>	137	Southern Kan. R. Co. <i>v.</i> Hinsdale.	256
Pullman Palace Car Co. <i>v.</i> Ehrman.	362	Southern Kansas R. Co. <i>v.</i> Rice...	316
Pullman Palace Car Co. <i>v.</i> Pollock.	217	Southern Pac. R. Co., Hereford <i>v.</i>	133

TABLE OF CASES REPORTED.

	PAGE		PAGE
Southern Pac. R. Co., <i>Martin v.</i> ...	612	Union Pac. R. Co., <i>Martin v.</i>	612
Standen, Omaha & Republican Val-		Vicksburg, Shreveport & P. R. Co.,	
ley R. Co. <i>v.</i>	179	Houston <i>v.</i>	76
State <i>ex rel.</i> City of Minneapolis <i>v.</i>		Virginia Midland R. Co. <i>v.</i> Roach.	271
St. Paul, Minneapolis & M. R. Co.	168	Virginia Midland R. Co. <i>v.</i> White..	22
State <i>v.</i> Hungerford.....	265	Wachter, Ohio & Miss. R. Co. <i>v.</i> ...	194
Stevens <i>v.</i> Central R. & B. Co....	413	Waldrop <i>v.</i> Greenville, L. & S.	
Stewart <i>v.</i> Boston & Providence		R. Co....	204
R. Co.....	499	Wallace <i>v.</i> Western North Car. R. Co.	553
Taylor <i>v.</i> Seaboard & Roanoke		Way <i>v.</i> Chicago, Rock Island &	
R. Co.....	344	Pac. R. Co.....	286
Templin <i>v.</i> Chicago, Burlington &		Webber <i>v.</i> Herkimer & Mohawk St.	
Pac. R. Co.....	107	R. Co.....	580
Terre Haute & Indianapolis R. Co.		West Side St. R. Co., Woodward <i>v.</i>	472
<i>v.</i> McCoy.....	212	Western & Atlantic R. Co., Coving-	
Texas & Pacific R. Co., Hobbs <i>v.</i> ..	268	ton <i>v.</i>	469
Topeka City R. Co. <i>v.</i> Higgs.....	529	Western North Carolina R. Co.,	
Trich, South Side Pass. R. Co. <i>v.</i> ..	549	Wallace <i>v.</i>	553
Troy <i>v.</i> Cape Fear & Y. V. R. Co.	13	White, Virginia Midland R. Co. <i>v.</i>	22
Trustees Cincinnati Southern R.		White Water Valley R. Co. <i>v.</i> Butler.	467
Co., Campbell <i>v.</i>	113	Wilkes, International & Great Nor-	
Ulrich <i>v.</i> New York Central &		thern R. Co. <i>v.</i>	331
H. R. R. Co.....	350	Winnegar <i>v.</i> Central Pass. R. Co..	462
Underwood, International & G. N.		Wood, Sabine & East Tex. R. Co. <i>v.</i>	190
R. Co. <i>v.</i>	570	Woodward <i>v.</i> West Side St. R.	
Union Pac. R. Co. <i>v.</i> Dunden.....	88	Co.....	472

CENTRAL RAILROAD & BANKING CO.

v.

SMITH.

(Georgia Supreme Court.)

Negligence. — Omission of Statutory Duty. — While negligence is always a question of fact when the law is silent touching the specific act done or left undone, yet where a statute expressly enjoins an act, the act is then within all degrees of diligence, even the very lowest, and its omission is negligence as matter of law.

Same. — Statutory Limit of Speed. — Instruction. — An ordinance limiting the rate of speed in passing over crossings to ten miles an hour, does not imply that this rate may not be exceeded between crossings; and in an action to recover damages for personal injuries, it is error to instruct the court, that, if at the time of the accident the rate of speed was more than ten miles an hour, that would be negligence, if the injury was occasioned to plaintiff between crossings and sixty-five yards from the nearest.

Trespasser on Track. — Gross Negligence. — To walk along the middle of a railroad track between crossings when it is dark, without knowing or remembering whether a train is due or not, and without looking out in both directions for trains that may be due, and without listening attentively and anxiously for the noise of machinery, as well as for the sound of bell or whistle, is gross negligence. A person so trespassing must guard, not only against negligence on the part of the railroad company, which he might discover in time to avoid the consequences, but also against the ordinary danger of there being negligence which he might not discover until too late.

Same. — Recovery under Statute. — Apportionment. — Under the Georgia statute giving a right to the recovery of partial damages from a railroad company where a person injured has been guilty of contributory negligence, the plaintiff in an action cannot recover if he has trespassed upon the track, and been grossly negligent in failing to anticipate and look out for the approach of trains.

APPEAL from Superior Court, Clayton County.

Action to recover damages for personal injuries sustained by plaintiff while on defendant's railroad track. The opinion states the facts.

A. R. Lawton, John D. Stewart, W. L. Watterson, and John I. Hall for plaintiff in error.

Spence & Stewart, C. W. Hodnett, and R. T. Dorsey for defendant.

BLECKLEY, C. J. — Smith recovered against the Central Railroad Company heavy damages for a personal injury. The railroad company made a motion for a new trial, and it was overruled. One of the grounds of the motion was, Facts. that the judge instructed the jury that, if there was a failure to

check the speed of the train and ring the bell at a crossing within the limits of the town of Jonesboro, it was negligence; also that a failure to observe an ordinance of the town as to the rate of speed, if they found there was such an ordinance (which question he referred to the jury), would be negligence. He charged them touching that ordinance as if it applied to the whole town; whereas, in looking to the record, we find that the ordinance applies only to the crossings within the town. It was not an ordinance limiting the rate of speed in running all the way from one corporation line to the other, but simply limiting the rate of speed to not exceeding ten miles an hour on the crossings.

1. The omission of specific acts of diligence prescribed by statute or by a valid municipal ordinance is negligence *per se*, and the court may so instruct the jury. While negligence is, always a question of fact when the law is silent touching the specific act done or left undone, yet, where a statute expressly enjoins an act, the act is then within all degrees of diligence, even the very lowest, and its omission is negligence as matter of law. Whether the prescribed act was done or not in the given case is, of course, by its very nature, a question of fact; but whether it should or should not have been done, the statute settles by prescribing it as a duty. *Railroad Co. v. Wyly*, 65 Ga. 120; s. c., 8 Am. & Eng. R. R. Cas. 262; Code, sects. 708, 710.

2. The next point we rule is, that an ordinance limiting the rate of speed in passing over crossings to ten miles an hour does not imply that this rate is not to be exceeded between crossings. The injury occurred between crossings, some sixty-five yards from the nearest, and the ordinance did not apply to that point; yet the judge instructed the jury, that if, at the time the injury occurred, the rate of speed was more than ten miles an hour, that would be negligence, provided there was an ordinance in evidence (as there was) applicable to the town of Jonesboro. This instruction was erroneous, because the ordinance did not apply to the place of the injury, the same not being a crossing.

3. The circumstances of the injury were very striking, and somewhat peculiar considering that there was a recovery. Smith, shortly before day, while it was still dark, got on the railroad track, in Jonesboro, at a crossing, and turned down the track, using it for a walk, and had gone only about sixty or sixty-five yards when the train, running at high speed, struck him, threw him off the track, crushed his leg, and injured him seriously. The evidence as to the negligence of the railroad company was somewhat conflicting, but there was an admitted failure to ring the bell when approach-

Negligence in
omission of
statutory duty.

Ordinance
limiting speed
at crossings.

Gross negli-
gence of
plaintiff.

ing and passing over the crossing. Smith, however, was not on the crossing, nor on that side of it which the engine was upon in approaching it; he was on the farther side of the crossing. The train was probably running at a much higher rate of speed than it ought to have run so near to a crossing. There was some evidence tending to show that the speed was low; but grant that it was high, too high, and that there was very great negligence on the part of the railroad company, yet it is manifest that Smith was out of his place at the time he was injured. Grant that the track was often used by persons to walk along it; that there was no objection to such use; that Smith was there by implied or tacit license, — he was there under circumstances that required him to have all his senses on the alert for trains, and to get out of the way when any of them approached. It would be flagrantly unreasonable and improbable to presume that he or any one else had the shadow of a right to use the track, especially at such an hour, on any other condition. The train was on its regular schedule time. He quietly walked along upon the track as if it belonged to him; the train struck him, knocked him down, and broke his leg, those on the engine not seeing him or being aware of his presence. It was, at least, as much his business to look for the engine as it was the engineer's business to look for him. The engine was a much larger object than he was; it carried a headlight, and could have been seen as far as he could. It was not possible for the engineer to have discovered him on the track sooner than he could have seen the headlight. The presence of the engine was more to have been expected by him than his presence was to be expected by the engineer. He had much less reason to be surprised than the engineer had. As matter of fact, to walk along the middle of a railroad track between crossings, when it is dark, and without knowing and remembering whether a train is due or not, and without looking out in both directions for trains that may be due, and without listening attentively and anxiously for the roar and rattle of machinery, as well as for the sound of bell or whistle, is gross negligence.

4. There is very frequently a mistake made in not considering our duties to the absent. Corporations are necessarily absent. They cannot be present otherwise than by a fiction. They are blind and deaf, and have no hands; and they are constrained to transact their business and conduct their operations by means of servants and agents. They are entitled to no more protection than a natural person employing such instrumentalities, but are entitled to as much. If there is any difference upon principle, a fair mind would be disposed to be rather more indulgent towards them, and to treat them like an infirm natural person who, by reason of having deficient

Duty to corporations.

physical powers of his own, had to employ servants and agents necessarily. But the law places all persons, natural and artificial, simply upon equal terms as to the short-comings of their employees. Everybody knows that servants and agents are prone to be less attentive to the business of employers than men are to their own affairs. Has anybody a right, by an act of gross negligence on his own part, to put an employer to the risk of injuring him by the negligence of a careless servant? You send your servant to do something upon your premises. I have leave, express or implied, to be upon the same premises. By my negligence I get in the way of your servant; he proves to be negligent also, and I am injured. I bring an action, and maintain it, against you for the negligence of your servant. If I am in my right place, and in the use of proper care and diligence, you ought to answer for your servant the same as for yourself; but if I am out of place, and thereby put you to the hazard of your servant approaching me negligently, and hurting me, it ought to be a strong case that would entitle me to recover against you, — a very strong case. The case before us is very weak. A person, while grossly negligent himself, has no legal right to count on

due diligence by others, but is bound to anticipate that others, like he has done, may fail in diligence, and must guard not only against negligence on their part, which he might discover in time to avoid the consequences, but also against the ordinary danger of there being negligence which he might not discover until too late. Smith shows by his own testimony that he did not discover his danger. If he had been on the crossing, or at any place he was by right entitled to be, he would have been warranted in assuming that the whole world would be diligent in respect to him and his safety; but, as he was engaged in an act of gross negligence himself, he ought to have anticipated that somebody else might fail in diligence, and the consequences might come down upon him before he discovered the negligence. This view of the law of the case was not presented by the court in charging the jury; but, on the contrary, it seems to have been the opinion of the judge, and so announced in the charge, that unless Smith could have avoided the consequences of the company's negligence by the exercise of ordinary care (his duty to exercise that care beginning when he might or ought to have discovered the company's negligence), he could still recover partial damages under the rule of apportionment laid down in the Code for cases of contributory negligence. The error of this position, under the facts of the present case, is, that Smith was under obligation, when grossly negligent himself, to anticipate negligence as well as to discover it. He could not discover it

**Plaintiff's
duty to
anticipate
negligence.**

until it had begun; he ought to have anticipated that it might begin, and that he might not find it out in time to shun the consequences.

There are various grounds in the motion for a new trial, various points made; but what we rule disposes of the case upon its real merits, and it is unnecessary to deal with every point. We reverse the judgment with the rulings which I have read from the bench in the notes prepared to be used as a syllabus to this opinion. The court erred in the charge, and the verdict was not warranted by the evidence. Judgment reversed.

Injury to Trespassers on Track. — Liability for. — See *post* *Guenther v. St. Louis, I. M. & S. R. Co.*, and note.

It was held in *Strong v. Canton, A. & N. R. Co.*, decided by the Supreme Court of Mississippi Jan. 23, 1888, that the Mississippi statute which prohibits locomotives and cars from being run through corporate limits at a greater speed than six miles an hour, does not render the company liable for an injury done while the statute is being violated, to a person who trespasses upon the track, and goes upon a trestle without looking or listening to discover moving trains or locomotives, if before the accident the engineer or employees in charge did not see him. The court say, —

“It is the settled doctrine of this court, that sect. 1047 of the Code, which prohibits locomotives and cars from being run through towns, cities, and villages at a greater rate of speed than six miles an hour, does not impose absolute liability on a railroad company for an injury done while the statute is being violated, without regard to the conduct of the person injured, or the circumstances under which the injury occurred; and that, when a railroad company violates the statute, one who could by the exercise of ordinary care avoid injury resulting from the act of the company, and fails to do so, cannot recover for such injury. *Railroad Co. v. McGowan*, 62 Miss. 682; *Railroad Co. v. Stroud*, 64 Miss. 784; s. c., 31 Am. & Eng. R. R. Cas. 443.

“Appellant was grossly negligent, and guilty of a flagrant disregard of personal safety, in going on the trestle without looking or listening to discover moving trains or locomotives; but, notwithstanding this, if the engineer or employees in charge of the locomotive saw her on the trestle, where she could not readily leave the track with safety, they were bound to stop the locomotive, or do all they could to stop it, and to avoid the injury. *Jamison v. Railroad Co.*, 63 Miss. 33; *Railroad Co. v. Stroud*, *supra*. There is no evidence in the record which shows that the engineer or other employees of the company saw appellant in her perilous position on the trestle, or from which it can be fairly inferred that she was seen in that position by him or them, before she was struck; and the court properly instructed the jury to find for appellee. *Railroad Co. v. Doyle*, 60 Miss. 977.”

Omission of Statutory Duty as affecting Company's Liability. — See *Mobile & Ohio R. Co. v. Stroud*, 31 Am. & Eng. R. R. Cas. 443, note, 447.

GULF, COLORADO, AND SANTA FÉ R. Co.

v.

GASCAMP.

(Texas Supreme Court, Jan. 27, 1888.)

Action for Personal Injuries. — Defective Bridge. — Contributory Negligence. — Where a person, travelling on horseback, attempted to cross a bridge constructed and maintained by a railroad company as a portion of a crossing over its right of way, and such bridge is the only practicable crossing for him in the direction in which he is travelling, he is not guilty of negligence contributing to injuries caused through defects in such bridge, although he attempted to cross in the knowledge of such defects.

APPEAL from Washington County District Court.

Action by H. W. Gascamp against Gulf, Colorado, & Santa Fé Railway Company, for damages for personal injuries sustained by plaintiff while attempting to cross a bridge over its right of way.

The defendant appeals from a verdict and judgment for the plaintiff. The facts are stated in the opinion.

Garret, Searcy & Bryan, for appellant.

C. R. Breedlow for appellee.

GAINES, J. — This was an action, brought by appellee against appellant, to recover damages for personal injuries alleged to

Facts. have accrued to the plaintiff by reason of the failure of the defendant to keep in repair a bridge upon a public road where the highway crossed its track. There was testimony showing that the bridge was out of repair, and that it was dangerous to cross it, and the plaintiff knew of this. But it also appeared that many persons habitually passed over on horseback and in vehicles; and, so far as the witnesses knew, no injury had occurred previous to that complained of by plaintiff. He testified himself to the defective character of the bridge, and to his knowledge of the fact, and also that this was the only public road from his house to the city of Brenham. He further swore that he was on his way to Brenham on the day of the accident, riding on horseback, and that, in attempting to cross the bridge, a plank which was loose and rotten became displaced, and frightened his horse, and caused him to be thrown across the iron of the railroad track, thereby inflicting upon him serious personal injuries. The defendant attempted to show that the bridge was kept in proper repair, but the evidence to the con-

trary was more than sufficient to sustain the verdict for plaintiff on this issue. No one was present when the accident occurred but the plaintiff, and he testified to no unusual care in attempting to cross over the bridge.

It is now assigned as error that the verdict of the jury is contrary to the evidence, because the testimony shows "that the plaintiff was guilty of contributory negligence in attempting to ride across a bridge that he knew was defective and dangerous." The issue of contributory negligence was submitted to the jury, and has by the verdict been determined in plaintiff's favor. This is conclusive of the question, unless we can say that the act of plaintiff was negligence in law, or at least that it tended so strongly to establish negligence on his part that the verdict should not be permitted to stand. According to the rule in this court, in order that an act shall be deemed negligent *per se*, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say, without hesitation or doubt, that no careful person would have committed it. It is apparent that this cannot be said of the plaintiff's conduct in this case. It is well settled, that if a highway or street be obstructed or out of repair, and this be known to a passenger, he cannot be held faultless if he threw himself upon the obstruction or encountered the danger, provided another way of reaching his destination be open to him which is safe and not much longer than that he prefers to travel. *City of Erie v. Magill*, 101 Pa. St. 616; s. c., 2 Am. & Eng. Corp. Cas. 579; *Schaefer v. Sandusky*, 33 Ohio St. 246; *City of Centralia v. Krouse*, 64 Ill. 19; *Parkhill v. Brighton*, 61 Iowa, 101; *Wilson v. Charlestown*, 8 Allen, 137. As far as our research has extended, these are the cases which most strongly support the position taken by appellant. But in each of them the proposition is stated with the important qualification that there must be another safe way by which the danger may be avoided; and it is to be noted that in every one stress is laid upon the point that there was another convenient route. The reason is, that a prudent person may choose to pass along an unsafe highway rather than abandon his trip, although he would have avoided the route if another had been open to him. It is accordingly held, on the other hand, that if the passenger or traveller have no other convenient way, the mere fact that he takes the chances of a known danger, and attempts a passage, is not controlling proof of his negligence. Whether the act be negligent or not, depends upon the circumstances attending it; and the question is for the determination of the jury. *City Council v. Wright*, 72 Ala. 411; *City of Huntington v. Breen*,

Contributory
negligence of
plaintiff.

77 Ind. 29; Turnpike Co. *v.* Jackson, 86 Ind. 111; Commissioners *v.* Burgess, 61 Md. 29; Dewire *v.* Bailey, 131 Mass. 169; Dooley *v.* Meriden, 44 Conn. 117; Evans *v.* Utica, 69 N. Y. 166; Templeton *v.* Montpelier, 56 Vt. 328; Loewer *v.* Sedalia, 77 Mo. 431; Reed *v.* Northfield, 13 Pick. 94; Osage City *v.* Brown, 27 Kan. 74; City of Salina *v.* Trosper, Id. 545; City of Aurora *v.* Hillman, 90 Ill. 61. In Dewire *v.* Bailey, *supra*, the Supreme Court of Massachusetts say, "We think the law in a case of this kind is, that only when the nature of the obstruction is such that the court can say that it is not consistent with reasonable prudence and care that any person having knowledge of the obstruction should proceed to pass over it in the manner attempted, can the court rule that such knowledge prevents the plaintiff from maintaining his action. In Commissioners *v.* Burgess, *supra*, the Maryland court use this language: "In this case the knowledge of the plaintiff was some evidence of negligence proper to go to the jury, to be considered by them in conjunction with the condition of the bridge of which he had knowledge, and to be found a bar only in case they found the bridge from the proof to be wholly unfit for use, and he knew its true condition." This language recognizes the correct rule, and is strictly applicable to the case now before us. The defendant, by showing that many persons habitually used the bridge with safety, proved that an attempt to cross it was not conclusive evidence of negligence. We conclude that the finding of the jury upon the issue of contributory negligence was warranted by the testimony, and that appellant's first assignment is not well taken.

The first charge asked by appellant contains the proposition, that, if the plaintiff went upon the bridge knowing it to be defective, he could not recover. It is apparent, from what we have said, that the court did not err in refusing the instruction.

The second special instruction asked by the defendant, and refused by the court, is a mere general statement to the effect that "if the plaintiff, by his own acts of negligence or carelessness, contributed to the injuries received by him," he could not recover. The court having stated the same proposition in its general charge, it was not necessary to repeat it. For the same reason, the court did not err in refusing the defendant's request for the fourth special instruction. Under the general charge the jury were only authorized to find for plaintiff in the event "they believed, from the evidence, that the bridge in question was at a public crossing of the defendant's road, and constituted a necessary part of said crossing." This gave the law more strongly for the defendant than the instruction asked and refused, and rendered any further charge upon the issue unnecessary. No witness very precisely states

Same.

Instructions.

the location of the bridge, but no contest was made as to its location in the introduction of testimony. It appears that the bridge was across a ditch, "just north" of the railroad track, and that plaintiff's horse was frightened on the bridge, jumped into the ditch, and threw him across the iron rails. Defendant's "section foreman" testified that it was his duty to look after the crossings, and that he had examined the bridge in question, and had repaired it.

The conclusion is irresistible, that the bridge which caused the injury was a bridge which it was the duty of defendant to keep in safe condition (Gen. Laws, 19th Leg. 45), and that there was nothing in the evidence calling for any very particular charge upon the subject. The judgment is affirmed.

Knowledge of Danger will not impute Contributory Negligence.—It is well settled that the use by a traveller of a defective street, sidewalk, or crossing is not contributory negligence *per se*. See *Gordon v. City of Belleville*, and note, 20 Am. & Eng. Corp. Cas. 341; notes, 20 Am. & Eng. Corp. Cas. 298, 299; *City of Erie v. Magill*, 2 Am. & Eng. Corp. Cas. 579.

MAGUIRE

v.

FITCHBURG R. CO.

(*Massachusetts Supreme Judicial Court, March 5, 1888.*)

Negligence. — Due Care. — Evidence of Positive Act. — In an action by an administratrix to recover damages for the death of her intestate, it appeared that the deceased, an employee in an elevator, was injured while assisting in the unloading of two cars in the building, the brakes of which had been set, and the cars thus rendered stationary. The intestate was ordered by the foreman to stop work, and there was no evidence to show where he went or what he did thereupon. The railroad company negligently and without reasonable warning, while the cars were being unloaded, sent other cars into the building against the stationary cars with such violence as to force them a considerable distance from their position; and immediately after, the intestate was found dead, lying across a rail of the track. *Held*, that the case was not one in which it was necessary to show some positive act on the part of the intestate, in order to prove that he was in the exercise of due care, and that the question whether he did exercise such care should have been submitted to the jury on the facts.

ON report from Superior Court, Suffolk County.

Action by Catherine Maguire as an administratrix of her husband Daniel Maguire, against the Fitchburg Railroad Com-

pany, for damages for negligently causing the death of her intestate. No evidence was offered by the defendant, and at its request the Superior Court directed a verdict in its favor, and reported the case to the Supreme Judicial Court. The facts are stated in the opinion.

Henry W. Bragg and James A. Maxwell for plaintiff.

George A. Torrey for defendant.

DEVENS, J. — The only question presented by the case is whether any evidence was offered from which due and ordinary care could be inferred on the part of the plaintiff's intestate when the injury to him occurred. He was not the servant of the defendant, but of the elevator company; employed to perform such duties as might be assigned to him, and "to make himself generally useful." As the evidence tended to show, he was engaged in assisting the unloading of two cars in the elevator building, which had been brought in by the defendant, the brakes of which had been set, and the cars thus rendered stationary. The defendant negligently and without reasonable warning, while this operation was being performed, sent certain other cars into the building against the stationary cars with such violence as to force them a considerable distance from their position. Immediately after, the plaintiff's intestate was found dead, lying across one rail of the track. The track upon which the stationary cars thus being discharged stood, was a single one laid down between a platform (covering hoppers into which the grain was discharged from the cars) and the brick wall on the other side of the building. The cars occupied the whole space between this platform and the wall, except about eight inches on either side. During the operation of unloading, it was common for grain to fall from the cars outside the hoppers, and upon or near the track, and grain had so fallen at this time. It was the custom to sweep the grain which had thus fallen, into the hopper. It was a part of Maguire's duty, with that of the other men, to do this, and at other times he had been thus engaged. A few minutes before the accident he had been standing on the platform, attending to the regulation of feed from the hopper to the elevator belt, by which the grain was raised to the bins in the upper story, which was done by means of a small wheel regulated by hand. The assistant to the second foreman had told him "that would be enough," "to leave it," and did not know where Maguire then went to. "I then went to the other hopper," the witness continued, "and heard my second foreman sing out, and the cars came then just as quick as any thing; the men did not get time to let go of any thing, when the noise was made." The assistant foreman testi-

fied, "When the cars came in, I was standing on the platform, right at the door of the car where the men were working. I did not see Maguire at that particular time. I was talking with him about two minutes before that. I don't know where he went; he had a broom in his hand. He disappeared, and I don't know where he went." There was therefore evidence, that, after having been dismissed at the wheel, he had taken his broom for the purpose of using it, and had used it on the platform. At the precise time of the accident he was seen by no one, and when he "disappeared," as stated by the assistant foreman, it was not shown that he had stepped down onto the track; but he was there found, with his broom, when the accident was over.

While due care must be shown by a plaintiff in order that it may be sure that injury to him was not occasioned by any contributory negligence on his part, it is not necessary that any positive act of care shall be proved. It may be inferred from mere absence of fault, when sufficient circumstances are shown to fairly exclude the idea of negligence on his part. If a person is in the place where he may rightfully be engaged in duties which he may properly there perform, under circumstances which do not require the exercise of especial caution on his part against the acts or the negligence of others, he is in the exercise of due care. A passenger sitting quietly in his seat in a railroad car is, so far as relates to the management of the train, in the exercise of due care. When laborers are set to work upon a railroad track, upon the assurance, express or implied, that the use of such track is suspended, they are not guilty of negligence if they continue their work without constantly watching for coming trains. In the case at bar, the cars were in a building not belonging to defendant, and were fixed there for the purpose of being unloaded. The laborers had a right to conduct that work as it was usually done, without watching constantly lest a train should suddenly be driven in, and upon the assumption that proper notice would be given of an incoming train. If, after the collision, the body of one of the men standing upon the cars, and engaged in shovelling the grain, had been found upon the ground as if thrown down, there would have been sufficient evidence of due care from his employment, when the collision took place. The presence of the deceased on the track with his broom, as shown by the discovery of his body there, affords evidence that he was there for the purpose of sweeping. Whether he had actually begun or not is not important, if he was there for the purpose of commencing as soon as practicable. He had been dismissed elsewhere, and the sweeping the track was in the line of his duty. He was not bound any more than the shovellers

Plaintiff not
presumed to
have been
negligent.

to watch for approaching trains, but had a right to believe the laborers upon the cars, or engaged in removing the loose grain, would not be disturbed without proper notice. The jury might well have believed that he was on the track in the performance of his duty, and in the exercise of all the care to be expected of a prudent man. If rightfully in the place of danger, it is not contended that he had any opportunity to escape. The case is quite distinguishable from those cases where it has been held that the disclosure of the facts has been so limited, that there could be no fair inference that a plaintiff was in the exercise of due care, or that the evidence was equally consistent with care or negligence on his part. If the only negligence of which the deceased could have been guilty must have been that he was on the track with no rightful purpose, or under such circumstances that a prudent man would not have been there, and if the evidence and the inferences to be drawn from it tend to show affirmatively otherwise, the issue of due care may be sustained. Without undertaking to examine in detail the numerous cases cited by defendant, that upon which it principally relies is *Hinckley v. Railroad Co.*, 120 Mass. 257. But that case does not sustain the defendant's contention. It was one where evidence was necessary in order to show what was the conduct of the party injured, in regard to circumstances especially requiring care on his part. Without this, it could not be determined whether he was or was not in the exercise of due care, and no such evidence was offered. It was said not to differ substantially from a case where the party injured might have been found lying on the ground, having been knocked down by a passing car on the railroad track; there being no evidence as to what his own conduct had been. *Hinckley*, who attempted to cross a side railway track in order to reach the station on the other side, as he approached a place known as "Murphy's Corner," on his way thus to cross, had a view of the railway track for one hundred and fifty feet; and as he reached the track, it could have been seen by him for the distance of half a mile. One Basset, who was some fifteen or twenty feet behind him, stopped at "Murphy's Corner," and saw the car detached from the train, on the main line, which subsequently struck *Hinckley*. He called to *Hinckley*, but was probably not heard on account of the wind. It did not appear that *Hinckley*, either at "Murphy's Corner," at any intermediate point, or when near the track, and about to cross, exercised the precaution of looking to see whether any thing was approaching. No circumstances were shown which justify him in neglecting the usual and necessary precautions of those who are about to cross a railroad track, upon which a train or a car might be approaching. In the utter absence of evidence as to what *Hinckley* did

after the time when his conduct became a matter of importance, it was impossible to infer that he had exercised the care and circumspection properly to be demanded of him. The case at bar differs from that class of cases in which it is necessary to show some positive act on the part of the plaintiff in order to prove that he was in the exercise of due care. The plaintiff's intestate had a right to believe, if engaged in any labor connected immediately with unloading the cars, that he would not be interfered with by a reckless incursion of the trains of the defendant.

We are therefore of opinion that the inquiry whether the plaintiff's intestate was in the exercise of due care should have been submitted to the jury. The evidence objected to by defendant and received by the learned judge, that at other times the deceased had swept the loose grain, was competent, as showing the character of his employment. New trial granted.

TROY

v.

CAPE FEAR & Y. V. R. Co.

(North Carolina Supreme Court, April 2, 1888.)

Trespasser. — Permission of the Company. — A railroad company having by long consent allowed the public to pass and repass along a trestle, persons doing so are not trespassers.

Same. — Contributory Negligence. — Liability of Company. — Notwithstanding the contributory negligence on the part of a trespasser who exposes himself to danger of injury, if by the exercise of reasonable care and diligence on the part of the company and its servants an accident might have been avoided, the company is liable for injuries sustained by such trespasser.

Same. — Conflicting Testimony. — Verdict. — In an action by an administrator against a railroad company for wrongfully causing the death of plaintiff's intestate, the evidence on behalf of plaintiff tended to show that the intestate was walking over a trestle where the public had been allowed to pass and repass for many years; that defendant's construction-train came along very slowly, without giving any notice by sound of whistle or bell, and without any headlight; that it made little noise; that the track was straight for a considerable distance; that, when the deceased saw the train approaching, he tried to get over the trestle and could not, and then tried to get off, and got his foot hung; that deceased was sober at the time of the accident; and that the engineer had defective eyesight. The evidence for the defendant was to the effect that the planks had been put on the trestle for the use of its employees only; that there was a notice at a gate, "No admittance;" that the intestate was inside the gate and was drunk at the time; that he had been warned against going upon the track; that he was lying down; that the

engineer was competent; and that the headlight was burning. *Held*, that there was sufficient evidence of negligence on the part of the company to justify the court in refusing an instruction; that if the jury believed the evidence introduced by plaintiff, and the uncontradicted evidence offered by defendant, they would find that deceased was guilty of contributory negligence.

APPEAL from Superior Court, Cumberland County.

Action to recover damages for the negligent killing of the plaintiff's intestate. The opinion states the case.

T. H. Sutton for plaintiff.

G. M. Rose for defendant.

DAVIS, J. — Civil action, tried before Clark, J., at May term, 1887, of the Superior Court of Cumberland County, to recover damages for the alleged negligent killing of Thomas McDonald, the intestate of the plaintiff. It is alleged and ad-

Facts. mitted, that on or before the night of Oct 19, 1883, Thomas McDonald was run over while on the defendant's track in the town of Fayetteville. The plaintiff alleges that his intestate was walking on the defendant company's track at the time of the injury, at a place where "it was, and for a long time had been, the habit and custom of the people of the town of Fayetteville, and others, to pass and repass and cross the track" of defendant's road, and that, while so walking on the said road, he was run over by the carelessness and negligence of the defendant's servants in charge of a locomotive engine, and received injuries from which he soon thereafter died. The defendant denies negligence, and says that the plaintiff's intestate was a trespasser, and had no right to be on defendant's track; that he was a man of dissolute habits, frequently in a state of intoxication, was in that condition on the night of the injury, and was himself guilty of gross negligence in going on defendant's track in that condition; and that he was lying down, and in such a position that he could not be seen by the engineer when the accident occurred. The following issues were submitted: "(1) Was the death of plaintiff's intestate caused by the negligence of the defendant? (2) Was the plaintiff's intestate guilty of contributory negligence? (3) What damage is the plaintiff entitled to recover?" Many witnesses, thirty in number, were examined on the trial below; and the substance of their testimony was sent up with the case on appeal. As there was no exception to any of the evidence by the appellant, we deem it unnecessary to set it out in detail, but only to state, substantially, so much of it as is necessary to a proper apprehension of the exceptions to his honor's charge. The tendency of the plaintiff on that behalf was to show that there is a crossing on a trestle of the defendant's road upon which planks are placed, and that over this

trestle the public have been accustomed to pass and repass for twenty or twenty-five years, using it as a common passage-way. That on the night of the 19th of October, 1883, between eight and nine o'clock, the plaintiff's intestate (McDonald) was crossing over the trestle, when the construction-train of the defendant came into the town of Fayetteville, running slowly, — not faster than three or four miles an hour, — without giving any notice by sound of whistle or bell, and without any headlight. That it made so little noise, that some of the witnesses thought that it was only a hand-car. That it sounded no alarm at the crossing, and that no whistle was blown or bell rung from Little River to Fayetteville. That the track was straight for a considerable distance; and when the intestate saw the train approaching, "he tried to get across the trestle and could not, and then tried to get off, and got his foot hung." That he said he "saw the damned thing coming, and tried to get out of the way, but could not." That he made an outcry and sound of distress, which could be heard at considerable distance, — according to one witness, 800 or 900 yards. That the train was going slowly, and could have been stopped within 10 feet. That, if the bell had been rung at the crossing, the intestate would have had ample time to have gotten off. One witness (Smith) testified that he heard the distressing cry, got a lantern and waved it; that, "if the engine had blown at the corporation limits, he would have had time to release McDonald; that he started as soon as he heard the outcry." That the engineer was incompetent, "blind in one eye, and could not see well out of the other." That the intestate was an industrious man, and a skilled laborer, worth one dollar per day. That he sometimes drank, but was not a drunkard. That he was sober at the time of the accident. That he was fifty-five or sixty years of age, and in good health. On behalf of the defendant, the evidence tended to show that the planks on the trestle were put there by defendant, not for public use, but for the employees of the road when engaged about its business; that the defendant owned the property, and there was a public notice at the gate, "No admittance except on business;" that McDonald was inside the gate, was drunk on the occasion of the accident; that he was in the habit of going on the track intoxicated, and had been warned not to do so; that he was lying down; that, if he had been standing up, he could have been seen; that he himself said that, "if he had not been drinking, he would not have been caught there;" that he was drunk the evening of the accident, — so much so that he "could hardly keep his feet;" that Wright was a competent engineer, and had always been trusted. Wright, the engineer, testified that the headlight was burning; that he did not know whether the bell was rung or not;

that, "if a man had been standing up, he could have seen him 300 yards. Saw no man." He afterwards said that the "bell rung at the crossing. Heard cry about 100 feet off, — cry of distress."

The court charged the jury, that as to the first issue, if the accident was caused by negligence of defendant, the jury should answer "Yes," otherwise "No;" and that the burden was on plaintiff to show negligence. That if train was mov-

Instructions
to jury.

ing three or four miles an hour, defendant not being at a crossing, it was not negligence not to ring the bell or blow the whistle, unless such failure is shown to have contributed to the injury. *Parker v. Railroad Co.*, 89 N. C. 222. It would have been negligence if there had been no headlight, since, by the uncontradicted evidence, the track was straight for half a mile; but if there was a headlight, it was sufficient warning to deceased, and there could have been no negligence in failing to ring bell or blow whistle. That if the agent or engineer of company had notice, from the outcry or otherwise, that a human being was fastened on the track, it was negligence not to stop his train, if he had time to do so after receiving such notice; that is, if he received the notice at all. As to the second issue, the court charged, the failure of engineer to sound whistle or ring bell, if such were the fact, did not relieve deceased from necessity of taking ordinary precautions for his safety. Negligence of company's employees in that particular was no excuse for his negligence. He was bound to look and listen before attempting to cross the trestle, in order to avoid an approaching train, and not to walk carelessly into a place of danger. Had he used his senses, he might have heard or seen the coming train. If he omitted to do so, and walked thoughtlessly and carelessly on the track, he was guilty of culpable negligence, and contributed to his own injury. If he did use his senses, saw the train coming, or heard it, and yet undertook to cross the trestle instead of waiting for train to pass, and was injured, the consequences of the mistake cannot be cast on the defendant. No railroad company can be held for a failure of experiments of that kind. *Parker v. Railroad Co.*, 86 N. C. 228. But, notwithstanding the previous negligence of deceased (if the jury so find), if at the time when the injury was committed it might have been avoided by the exercise of reasonable care and prudence on part of defendant, the defendant is liable, and the jury would find second issue in favor of plaintiff. *Davies v. Mann*, 10 Mees. & W. 545, as cited in *Gunter v. Wicker*, 85 N. C. 312. The court further instructed the jury, that they were the sole judges of the facts, and the court had no right to intimate any opinion as to the weight of the testimony, or as to whether any fact was proven or not; that the jury were to find

the facts solely from the evidence, and to apply to the facts, as they found them to be, the law as laid down by the court, and bring in their verdict accordingly.

Plaintiff requested court to charge: (1) If the railroad company had by long consent allowed the public to pass and repass the trestle-work, then he was not a trespasser. (This was given.) (2) That if the engineer in charge was incompetent, or if, from the circumstances of the case, the servant of the defendant (the engineer) exhibited a careless or reckless disregard of life or limb, the defendants are liable in damages. (This was given.) (3) That in coming into a populous town (as is admitted in the pleadings) more care is necessary than otherwise. Especially is this so when an engine is coming out of time, or at an unusual hour. (This was given.) (4) That if the deceased was guilty of contributory negligence, and the jury believe, that, if ordinary care had been used, the accident might have been avoided, then, though they believe the deceased contributed to the accident, the railroad is liable. (The court gave, instead of this, the words of *Davies v. Mann*, as quoted in *Gunter v. Wicker*, on top of p. 312.) (5) That what the damages are is to be fixed by the jury, under all the circumstances of the case; the same being left largely to the common sense and discretion. (This was given; the court explaining, however, it must be restricted to actual damages, i.e., the money loss, calculating the annual net earnings and expectancy of life, etc.) (6) If the engine was without headlight, and did not ring the bell or blow the whistle coming into town, this of itself is evidence of negligence on the part of the railroad company, especially where human life is the forfeit of his failure to use the above ordinary care. (This was given; the court adding that it would be a circumstance, if true, to be weighed in connection with all the evidence in the case.)

Further instructions requested by plaintiff.

Defendant requested the following charges: (1) If the jury believe that Thomas McDonald was run over by engine of defendant at a place not a public crossing, but on private property of defendant, company would not be responsible, unless engineer knew of deceased's dangerous position on the track, "or with reasonable care and diligence might have known it." (This the court gave, adding the words in quotation-marks.) . . . (4) If deceased, in attempting to get off track, caught his foot, and was unable to get off, and was lying in such a position that he could not be seen by engineer, his accident was the result of his own recklessness, and company is not responsible, "unless there was such outcry that the engineer, with reasonable care, could have

Charges requested by defendant.

prevented the accident." (This the court gave, adding the words in quotation-marks.) (5) If the jury believe the statement made by deceased to plaintiff's witness, to wit, "I saw the damned thing coming, and tried to get out of the way, but couldn't;" and, "I saw the engine coming. Thought I had time to cross the trestle. Found I had not. Tried to get off, and got my foot hung," — his conduct as thus stated was contributory negligence. "This, subject, however, to the condition that the defendant, with reasonable care and prudence, could not have avoided consequence of deceased's negligence." *Gunter v. Wicker*. (Given after adding words in quotation-marks). (6) If the jury believe the evidence introduced by plaintiff, and the uncontradicted evidence offered by defendant, they will find that deceased was guilty of contributory negligence. (This was not given, except as far as embraced in other charges given.)

To the first issue the jury answered "Yes;" to the second, "No;" and to the third, "\$2,000." Judgment and appeal.

The charge of the court was given with care, and, we think, stated the law fully and fairly, as applicable to every view presented by the evidence. We have given it as sent up with the case on appeal. But only two exceptions (one to the first instruction asked for by the plaintiff, which was given, and the other to the sixth instruction asked for by the defendant, which was refused) were insisted upon in this court; and, as the other exceptions were not pressed, we dispose of them by saying that they were of no avail.

1. The defendant says that the plaintiff's intestate was a "trespasser," and, being wrongfully on the track of defendant's road, the injury was the result of his own wrong. For this position many authorities are cited, and especially *Bacon v. Railroad Co.*, 15 Am. & Eng. R. R. Cas. 409, and the note, in which many cases are cited to the effect that persons walking upon the track of a railroad are trespassers, and generally considered to be guilty of such contributory negligence as to bar a recovery of damages for injuries sustained while so trespassing. We think that, upon a careful examination of the cases cited by counsel for the appellant, it will be found that in most of them the injury was the result of the contributory negligence of the party injured, proximately causing it, and not resulting directly from the negligence of the defendant; and where they have gone beyond this, they are not in accord with the rulings of this court, nor in harmony with the current of authority. In *Byrne v. Railroad*, 104 N. Y. 362, and 58 Am. Rep. 512, it was said "that when the public for a series of years had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted

Whether
plaintiff was
a trespasser.

to a license or permission to cross at the point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains, so as to protect them from injury." And this position is supported by abundant authority. But, even if he were a trespasser, we do not assent to the idea that the company is thereby released from reasonable care. In *Railroad v. McGowan*, 62 Miss. 682, Campbell, C. J., says, "One may be technically a trespasser, and, if he uses due care to avoid injury from the wrongful act of another, he may recover; and he may not be a trespasser, and yet guilty of such contributory negligence as to preclude him from recovering." He says, "The criterion is whether he observes due care, under the circumstances of his situation, whatever it may be, to avoid harm from the act complained of." To constitute such contributory negligence as will defeat a recovery, it must be the proximate and not the remote cause of the injury. In *Railroad Co. v. Trainor*, 33 Md. 542, it is said, "By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. No man would ever have been killed on a railway if he had never gone on or near the track. But if a man does imprudently and incautiously go on a railroad track, and is killed or injured by a train of cars, the company is responsible, unless it has used reasonable care and caution to avert it; provided, the circumstances were not such, when the party went on the track, as to threaten direct injury; and provided that, being on the track, he did nothing, positive or negative, to contribute to the immediate injury." In *Railway Co. v. Sympkins*, 54 Tex. 615, it is said that a reasonable lookout, varying according to the danger and surrounding circumstances, is a duty always devolving on those in charge of a railway train in motion; and railway companies are bound to exercise due care to avoid injury to others, and a failure to do so will render them liable for injuries resulting, even to a trespasser who has not been guilty of contributory negligence." In *Parker v. Railroad*, 86 N. C. 221, relied on by defendant, the deceased could, by using ordinary care, have avoided the injury, and the defendant could not stop the engine in time to prevent it. We conclude that there was no error in giving the instruction complained of.

Same. Acquiescence of company in use of track.

When trespasser may recover for injuries.

2. The second exception relied on here was to the refusal to give the sixth instruction asked for by the defendant. This instruction "was not given, except as far as embraced in other

charges given." There was evidence tending to show that the negligence of the defendant was the direct and proximate cause of the injury; and there was evidence tending to show that the deceased, being on the track, under the circumstances detailed in the evidence (which was not, *per se*, such contributory negligence as relieved the defendant from liability for failure to use ordinary care), could not avoid the injury. These questions were left fairly to the jury, and we can see no error in the instructions of the court excepted to, or in refusing those asked and denied. There is no error.

Refusal to
give sixth
instruction.

Trespassers on Track. — See *post* Virginia M. R. Co. v. Wite's Admr.

Duty of Company to Licensees. — The general rule seems to be, that if a person is upon a railroad track by the acquiescence of the company, evidenced by a general use on the part of the public, or even of certain individuals, the company owes a duty of care towards such persons which it does not owe to mere trespassers. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362; s. c., 58 Am. Rep. 512; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289; s. c. 13 Am. & Eng. R. R. Cas. 615, 44 Am. Rep. 377; *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 244; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646; s. c., 15 Am. & Eng. R. R. Cas. 424; *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 626; s. c., 4 Am. & Eng. R. R. Cas. 562; *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67; *Griffiths v. London & N. W. R. Co.*, 14 L. T. 797.

Acquiescence in Crossing. — Under the decisions, if the public have been permitted constantly and notoriously, and for a long period, to cross a railway at a place not a highway crossing, persons so crossing are not to be deemed trespassers. *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 620; s. c., 14 Kan. 38; *Kelly v. Southern Minnesota R. Co.*, 88 Minn. 98; s. c., 6 Am. & Eng. R. R. Cas. 264; *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 293; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 461; *Huelsenkamp v. Citizens' R. Co.*, 37 Mo. 537; *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362; s. c., 58 Am. Rep. 512; *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289; s. c., 13 Am. & Eng. R. R. Cas. 615; 44 Am. Rep. 377; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Philadelphia & R. R. Co. v. Troutman*, 6 Am. & Eng. R. R. Cas. 117; *Taylor v. Delaware & H. Canal Co.*, 113 Pa. St. 162; s. c., 28 Am. & Eng. R. R. Cas. 656; 57 Am. Rep. 446; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67.

Use of Road-bed as Foot-Path. — Nor are persons using the right of way in pursuance of a use by foot travellers which has been permitted without objection for a great number of years. *Illinois C. R. Co. v. Hammer*, 72 Ill. 347; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 219; *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646; s. c., 15 Am. & Eng. R. R. Cas. 424; *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 626; s. c., 13 Am. & Eng. R. R. Cas. 615. See also *Murphy v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 661.

So, too, a company which has run its road in close proximity to a house, and has left a well where the family residing in the house got their water on the other side of the track, must increase its vigilance, when it knows that the family are accustomed to cross the track to obtain water. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475.

But an intending passenger, who, in his hurry to reach the station in order to take a train, in crossing a vacant lot, passed over a ditch and under a wire fence,

and climbed an embankment to reach the track and platform, was held to be a trespasser upon the track, although the path had been used as a means of access to the station by the public during several years; it being obvious that the company did not intend passengers to reach its station by the way and in the manner he chose to adopt. *Comly v. Pennsylvania R. Co. (Pa.)*, 11 Cent. Rep. 206. In this the court say, "That Washington A. Comly was a trespasser, and brought upon himself the misfortune which befell him, is not doubtful. Nothing could be more obvious than that the railroad did not intend that passengers should reach its station by the way and in the manner he chose to adopt. The ditch and the character of the ground were of themselves sufficient notice of this fact; but, in addition, the wire fence under which he had to stoop to reach the point of the accident was positive warning, that, in passing it, he assumed every risk that might possibly occur on his way to the train which he intended to board."

Active and Passive Negligence. — The distinction between active negligence causing an injury and mere passive negligence must be clearly kept in view. *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362. Thus, if the company carelessly back its cars against a person using the track by acquiescence, it will be responsible. *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289; s. c., 13 Am. & Eng. R. R. Cas., 615. But if the casualty is caused by an omission merely, and without human agency, as by the neglect to properly fasten cars, which moved and ran against the party injured, there is no liability. *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 244; *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

In some States the courts adopt a different view, and hold that passive negligence, or negligence by omission, will render the company liable, provided the omission be the proximate cause of the injury. In *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646; s. c., 15 Am. & Eng. R. R. Cas. 424, the negligence consisted in leaving on the defendant's track, unattended, an engine fired up, with water in the boiler, which exploded and injured plaintiff, who was walking on defendant's track at a place where the public had for many years been accustomed to pass. It was held that plaintiff could recover for the negligent omission of defendant's servants. So, too, the negligent omission of the company to remove a signal torpedo which had been deposited at a place where the public had long been accustomed to cross the track, although there was no public highway at the place, was sufficient to give a cause of action to a person who was injured by its explosion. *Harriman v. Pittsburgh, C. & St. L. R. Co. (Ohio)*, 32 Am. & Eng. R. R. Cas. 37.

Mere acquiescence in use of track, however, is held by some cases not to be sufficient to give the persons going upon the track the character of licensees, and that there must be in addition some inducement or invitation to the public, before the company will owe them any duty. *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 513; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *Murray v. McLean*, 57 Ill. 378; *Stewart v. Pennsylvania R. Co. (Ind.)*; 14 Am. & Eng. R. R. Cas. 679; *Wright v. Boston & A. R. Co.*, 142 Mass. 296; s. c., 28 Am. & Eng. R. R. Cas. 652; *Johnson v. Boston & M. R. Co.*, 125 Mass. 75; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208; *Carleton v. Franconia, I. & S. Co.*, 99 Mass. 216; *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. (10 Allen) 368.

In keeping with this doctrine, it has been held that a person using a railroad depot which extends between two streets, simply as a means of travel, and for the purpose of saving time, is not entitled to the privileges of a licensee, even though the public were in the habit of so using the depot, and he himself had a stop-over ticket entitling him to leave the city by a train departing from such depot. *Johnson v. Boston & M. R. Co.*, 125 Mass. 75. If, however, the company construct and maintain the planking usually found

at a crossing, and station a flagman to warn people using the crossing, it will be deemed to have held out an inducement or invitation to the public to cross its track at that place, although in fact no highway exists there. *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. (10 Allen) 368. See also *Wright v. Boston & A. R. Co.*, 142 Mass. 296; s. c., 28 Am. & Eng. R. R. Cas. 652; *Murphy v. Boston & A. R. Co.*, 133 Mass. 121; s. c. 14 Am. & Eng. R. R. Cas. 675.

VIRGINIA MIDLAND R. Co.

v.

WHITE'S ADMR.

(*Virginia Supreme Court of Appeals*, Feb. 16, 1888.)

Trespasser on Track ¹ — **Negligence** — **Proximate Cause**. — In an action by an administrator to recover damages for the death of his intestate, it appeared that the deceased had been employed repairing a house occupied by one of the defendant's employees, and belonging to the company; that the only means of access to the house was along defendant's track; that deceased, while returning from such house, stepped off the side track on to the main track to avoid a train; that a yard-engine and tender which were not in view when he did so, backed along the track in the direction in which he was moving, at a speed in excess of that limited by the ordinance of the municipality; that the engineer did not look out, and no warning was given by whistle or otherwise. *Held*, that the negligence of the company and its servants was the proximate cause of the injury, even though the deceased may not have been without fault, and that plaintiff was entitled to recover.

Same — **Duty of Engineer** — **Lookout** — **Warning**. — It is the duty of a railway engineer to keep a prudent lookout upon the track, to warn trespassers of approaching danger, and to use ordinary care and diligence to prevent any accident.

Same — **Licensee** — **Duty of Company** — Where the only access to a house is by way of railroad track, and the company has allowed the track to be used therefor for a number of years, a person using the track for such purpose is not a trespasser, but a licensee; and the company is bound to exercise ordinary care and prudence towards him.²

Same — **Excessive Damages** — **Amount**. — A brick-mason, who was killed while lawfully upon a railroad track, left a widow and a number of children. In an action against the company by his administrator, *held*, that a verdict for \$5,000 was not excessive.

ERROR to Lynchburg Corporation Court.

Action by the sheriff of Amherst County, as administrator of W. H. White, to recover damages from the Virginia Midland Railway Company for negligently killing his intestate. The opinion states the case.

¹ TRESPASSERS ON TRACK. See *post* *Guenther v. St. Louis, I. M. & S. R. Co.*

² DUTY OF COMPANY TO LICENSEES. See *ante* *Troy v. Cape Fear & Y. V. R. Co.*

Kirkpatrick & Blackford for plaintiff in error.

Edward S. Brown, P. W. McKinney, and J. P. L. Fleshman for defendant in error.

LEWIS, P. — This was an action in the Corporation Court of the city of Lynchburg, brought under the statute, to recover damages for the alleged negligent killing of the plaintiff's intestate by the defendant, the Virginia Midland Railway Company. The deceased was killed by being run over by a yard-engine of the defendant, in its yard, within the corporation limits of Lynchburg, on the 12th of May, 1885. At the trial there was a verdict for the plaintiff for \$5,000 damages, whereupon the defendant moved to set aside the verdict, and for a new trial, on three grounds: *First*, because the verdict was contrary to the law and the evidence; *second*, because the court had misdirected the jury; and *third*, because the damages awarded were excessive. But the court overruled the motion, and gave judgment on the verdict, whereupon the defendant obtained a writ of error and *supersedeas*. The bill of exceptions contains a certificate of the evidence, which was conflicting, and all of which was *parol*, so that, in passing upon the questions of fact in the case, we can look to the evidence of the plaintiff only. And unless the verdict, when viewed in this light, be plainly wrong, the judgment must be affirmed, provided the exceptions to previous rulings of the court in the progress of the trial be not well taken. It appears from the record, that, on the morning of the day on which he was killed, the deceased went to the house of a Mr. Field, in Lynchburg, where he had engaged to do certain work as a brick-mason. He was a resident of Amherst County, and went to Lynchburg the previous day. He was a brother-in-law of Mrs. Field, and frequently visited her. Field was an employee of the defendant company, and occupied one of its houses, rent free, where he boarded a number of the company's hands. The house is situate on the company's land, at the foot of a steep bluff. A short distance north of it, and around the bluff, is the railroad bridge across James River, the northern boundary, at that point, of the city; and about a quarter of a mile south of it is the union depot in the city. The house fronts immediately on the company's tracks, at which point there are four tracks, — three side tracks and the main track. There is no other foot-path from the house, nor, indeed, from the railroad bridge, to the depot, than over these tracks, which, it seems, have been used for years by pedestrians going from the Field house and other places in its vicinity, to the depot and other business portions of the city. This user by the public has been with the acquiescence of the company. Without passing over the tracks the Field

house is virtually inaccessible. Beyond the curve, and near the bridge above mentioned, is a water-tank, which, owing to the bluff, is not in sight from a point on the tracks opposite the Field house. Soon after arriving at the house, the deceased inquired for Mr. Field, and was informed that he had gone down the track in "the direction of the sand-house" near the depot; whereupon he started out to find him. He stepped on one of the side tracks in front of the house, and walked in the direction of the sand-house, but had not gone far when, seeing a freight-train moving northward and approaching him on the same track, he got upon the main track, and, after proceeding on the latter track about 70 yards, he was suddenly struck and instantly killed by a yard-engine and tender moving backwards in the direction he was walking, the tender being in front. This engine was at the water-tank above mentioned when the deceased got upon the track at the Field house, and consequently was not then visible to him. And, according to the evidence for the plaintiff, no signal was given, by ringing a bell or otherwise, to warn persons of its approach, either when it left the water-tank, or in coming around the curve, or afterwards at any time before the deceased was killed. One of the plaintiff's witnesses, who says it "thundered" by him, about 30 or 40 yards from the deceased, testifies as follows: "I do not think the engineer and fireman on the engine were aware that he [the deceased] was on the track. I don't think they saw him. I did not see them looking out towards him. There was no watchman on the tender, and neither bell was rung nor whistle blown. I had to be pretty peart myself to get out of the way." The same witness also testifies, "I knew the track pretty well. Persons were in the habit of passing along it very frequently. They passes mighty nigh, as much so as on the streets. Persons from Amherst were in the habit of passing along the tracks." He also said, "I know the position of the Field house. I do not suppose it is more than a foot and a half from the step to the outside rail. There was no entrance to the house except from the track, that I know of, because there is nothing but a bluff on the other side. It has been the custom of the people to pass along that track as long as I can recollect. I was well acquainted with the deceased. I think his ordinary faculties were perfectly good. As to his hearing, I have talked to him very often, and I never talked to him louder than to any other person." There is some conflict in the evidence of the plaintiff as to the speed at which the engine was backing when the deceased was killed. Several of the witnesses say it was moving rapidly, — one of them estimating its speed at about the rate of 18 or 20 miles an hour; another at about 10. The latter estimate, we think, is established as the correct one by the pre-

ponderance of the testimony. One of the general ordinances of the city of Lynchburg provides as follows: "Every locomotive moving upon any railway track in the city shall have attached thereto a bell weighing at least 20 pounds, which shall be rung so long as such engine is moving in the city. Nor shall any such locomotive be moved at a greater speed than four miles an hour."

This summary of the principal facts established by the plaintiff's evidence shows a clear case for the plaintiff, unless the deceased was guilty of such contributory negligence as to defeat a recovery. The defendant contends that he was. It contends that it was negligence on his part not to look and listen for the approaching engine, but there is no evidence that he did not. The engine was not in view when he got on the side track, and the evidence does not show that it had rounded the curve and come in view when he left the side track and got on the main track. He had a right to rely on the performance of their duties by the agents of the defendant, and to suppose that in a frequented place within the city limits, as the evidence shows the company's tracks in the vicinity of the fatal spot to have been, they would obey the ordinance above mentioned, both as respects the signals and the speed it prescribes. By their failure to do so, they doubtless lulled him into a fatal belief of security, and there can be but little doubt, that, had they performed their duties, the deceased would not have been injured. It was gross negligence on the part of the servants of the company in charge of the yard-engine to have neglected to give the necessary signals, and to have moved a backing engine, with a tender before it, at the high rate of speed at which the evidence shows the engine was being propelled when the deceased was killed. They ought to have exercised greater precaution to avoid danger to human life, in such a locality; and for their failure to do so, the company is liable. In other words, their negligence was the proximate cause of the injury, even though the deceased may not have been entirely without fault. *Railroad Co. v. State*, 29 Md. 421.

**Contributory
negligence
of plaintiff.**

It is contended, however, that the court below erred in refusing to give to the jury certain instructions asked for by the defendant, and in giving certain other instructions in lieu thereof. The defendant asked for eight instructions, all of which, except the second, were refused. The first is as follows: "If the jury believe, from the evidence, that the plaintiff's intestate was killed by the engine of the defendant company while he was walking on one of the tracks of the defendant, in its yard in the city of Lynchburg, the plaintiff cannot recover for such injury

**Instructions.
No recovery un-
less engineer
could have pre-
vented acci-
dent.**

unless he proves to the satisfaction of the jury that the engineer controlling the engine by which the deceased was killed, after he discovered the danger in which the deceased was placed, could, by the use of ordinary care, have prevented the accident." This instruction was properly refused. Its vice is, that it ignores the duty of the engineer, or of those who were controlling the engine, to have exercised ordinary care and diligence in keeping a lookout to avoid injuries to the deceased; and, if given, would have in effect told the jury that, notwithstanding the engineer may have been guilty of gross negligence in running the engine, yet the company was not liable if, after discovering the deceased, he used ordinary care to prevent the accident. Such is not the law. It was the duty of the engineer to use ordinary care, not only after discovering the dangerous position of the deceased, but in keeping a lookout to warn him of the approaching danger. The law applicable to such a case is accurately laid down in *Tuff v. Warman*, 5 C. B. (N. S.) 573, where the qualification of the general rule relating to the effect of contributory negligence is thus stated: "Mere negligence, or want of ordinary care or caution, would not, however, disentitle him [the plaintiff] to recover, unless it were such that but for that negligence, or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequence of the neglect or carelessness of the plaintiff." This statement of the law, though it has been criticised and disapproved of by some courts, — notably in *Murphy v. Deane*, 101 Mass. 455, — has received the sanction of the House of Lords in subsequent cases, and is undoubtedly established doctrine of this court. *Railroad Co. v. Anderson's Admr.*, 31 Grat. 812; *Dun v. Railroad Co.*, 78 Va. 645; s.c., 16 Am. & Eng. R. R. Cas. 368; *Railroad Co. v. Moose*, 3 S. E. Rep. 796. And if in any of the decisions of this court there may be any language in apparent conflict with the doctrine, such language must be construed with reference to the particular circumstances of the cases with which the court was dealing.

The second instruction asked for by the defendant was given by the court, and will be referred to presently.

The third instruction asked for is as follows: "The defendant corporation has the legal right to the full, free, exclusive, and uninterrupted use of its track and yards for the conduct of its business; and strangers who go into said yards and upon such tracks for their own convenience, assume all the risks of injury which may arise therefrom, and are bound to use the highest degree of care and caution to avoid such injury; and, if so injured, no damages can be recovered therefor, unless it be

Same. Deceased not a trespasser. Licensee.

shown that the defendant company, after it discovered the danger, could have prevented the injury by the use of ordinary care and diligence." The last proposition contained in this instruction is obnoxious to the objection already indicated in respect to the first instruction, and is, moreover, objectionable in another point of view, which is this; namely, that it in effect assumes that the deceased, in entering the yard and walking on the tracks of the defendant, was a stranger, by which evidently was meant a trespasser. The evidence does not tend to show that he was; so that in this particular the instruction was not relevant to the case, and an irrelevant instruction ought not to be given. *Railroad Co. v. Moose*, *supra*, and cases cited. The evidence clearly shows that the deceased was not a trespasser, but a licensee; and whatever duty a railroad company may owe to a trespasser on its tracks, — *Railroad Co. v. Harmon's Admr.* (not yet reported), — a different rule applies to a licensee. As to the latter the rule is, that the company is bound to exercise ordinary care and prudence towards him, for the license creates this duty. *Beach, Contrib. Neg. sect. 17, p. 54.* This subject was very fully and ably considered by the Supreme Court of Wisconsin in the recent case of *Davis v. Railway Co.*, 58 Wis. 646, 15 Am. & Eng. R. R. Cas. 424. In that case the plaintiff, while on the premises of the defendant company as a licensee, was injured by the explosion of a steam-boiler. The explosion was occasioned by the negligence of the defendant's agents, and it was held that the action was maintainable. The court, after an examination of many of the authorities, recognized the rule above mentioned, saying "that in the case of a mere trespasser the company or its servants have no cause to anticipate that he will be on its track or in the way of danger, and therefore that a mere neglect to keep a lookout may not be such neglect as will render the company liable for running upon and injuring him; but that in a case where the company knows that a portion of its premises is constantly used by the public, with its acquiescence, as a footway, its servants are charged with notice that it will be so used, and they cannot without fault proceed in a manner which must necessarily be dangerous to such persons; and that a plaintiff injured by the failure of the company's servants to observe this duty need not aver and prove gross negligence on their part." And referring to the case of *Townley v. Railroad Co.*, 53 Wis. 626; s. c., 4 Am. & Eng. R. R. Cas. 562, which was an action to recover damages for injuries caused by the negligent running of a switch-engine, it was said, "It was taken for granted in that case, that, although the plaintiff was on the defendant's track simply by its license or acquiescence, yet that it owed a duty to such licensee to exercise

ordinary care in running its trains and engines, and that, if an injury was inflicted by reason of the want of such ordinary care, then the defendant was liable." It was also said, and the remark is applicable to the present case (Acts 1883-84, p. 705, sect. 7), that a statute making it an offence to walk along the track of a railroad company can have no effect in an action for damages against the company where the proof shows that the law has been constantly violated with the knowledge and acquiescence of the company, — certainly not as against a licensee who is injured by the carelessness of the company's servants. In *Railroad Co. v. Shearer's Admr.*, 58 Ala. 672, the defendant corporation was backing its train in the city of Opelika, pushing cars ahead of the engine, so that no one on the engine could see ahead of the train. There was no brakeman or other person to keep a lookout ahead; and the plaintiff's intestate, walking on the track in the direction the train was moving, was overtaken by the train, run over, and killed. It was held that this fixed the charge of negligence on the company: citing *Railroad Co. v. Dougherty*, 36 Md. 366; *Brown v. Railroad Co.*, 50 Mo. 461; *Railroad Co. v. Triplett*, 38 Ill. 483; *Beisiegel v. Railroad Co.*, 34 N. Y. 622. In *Railroad Co. v. State*, 36 Md. 542, the court said, "There are no circumstances under which the defendant could be relieved of the duty of using ordinary care. What constitutes ordinary care may vary with varying circumstances; but, as a general rule, it is for the jury to determine." In this case the deceased had been killed while walking on the defendant's track. In *Isabel v. Railroad Co.*, 60 Mo. 475, the court said, "Our decisions have been uniform, that, although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employees from the observance of due care; and they have no right to run over and kill him, if they could have avoided the accident by the exercise of ordinary caution and watchfulness." And it was further said, "Diligence and negligence are relative terms, and depend on varying circumstances. An act may be negligent at a particular place which would not be so at another place and under different circumstances." In that case the action was brought to recover damages for an injury to a child unlawfully on the defendant's track. And in all such cases the question has been held to be whether the defendant has exercised such care as, under the circumstances, the plaintiff had a right to expect; or, in other words, whether the defendant has been guilty of the breach of a legal duty, either in doing or omitting to do a particular act; for it is only where there has been such breach of duty that negligence can be predicated of the act complained of. *Railroad Co. v. McKenzie*, 81 Va. 71; s. c.,

24 Am. & Eng. R. R. Cas. 395 ; Railroad Co. v. Stout, 17 Wall. 657. In *Finlayson v. Railroad Co.*, 1 Dill. 579, the plaintiff's intestate was killed while walking as a trespasser on the defendant's track. At the trial Mr. Justice Miller instructed the jury that the agents of the defendant in charge of the train by which the deceased was run over and killed had a right to presume that he was a man of sound mind and good hearing, and that he would take reasonable care to protect himself; but that it was their duty to give fair and reasonable notice of the approaching train by sounding the whistle or ringing the bell, and that, if they delayed doing so until too late for him to get off the track, such delay was negligence. Further citations are unnecessary. Undoubtedly there are cases to the contrary; but the true doctrine applicable to a case like the present is, we think, as we have stated it.

The fourth, fifth, sixth, and seventh instructions which were asked for and refused are faulty for reasons already stated. The court, therefore, did not err in refusing to give them.

The eighth is as follows: "The court instructs the jury that the plaintiff, in order to recover in this cause, is under the burden of proving that the accident which resulted in the death of William H. White was the result of the failure of the defendant company to use ordinary care and vigilance to prevent the injury. If the defendant relies for its defence on the contributory negligence of the plaintiff, the burden of proving such contributory negligence rests on the defendant company. If the plaintiff claims a right to recover in this case, notwithstanding the contributory negligence of said White, on the ground that the defendant company could have prevented such accident notwithstanding such contributory negligence, then the burden of proving that the accident could have been so avoided is on the plaintiff."

Instruction as
to burden of
proof.

There is certainly nothing in this instruction which states the law too favorably for the defendant, and it is not easy to see why it should have been refused. The court, however, did refuse to give it; and its refusal would undoubtedly be ground for reversing the judgment but for the fact that in the second instruction asked for by the defendant, and which was given, the jury were substantially told what was asked for in the eighth instruction, and in even more favorable terms for the defendant: so that, by refusal of the court to give the last-mentioned instruction, the defendant has not been prejudiced. "It is well settled, that when instructions are given which cover the entire case, and which properly submit the case to the jury, it is not error to give others, even though in point of law they are correct; though it is safest for the court to give instructions asked for,

when they correctly propound the law, and are relevant to any evidence in the case." *Lunatic Asylum v. Flanagan*, 80 Va. 110; *Laber v. Cooper*, 7 Wall. 565; *Railroad Co. v. Horst*, 93 U. S. 291. The instructions given by the court in lieu of those which were offered by the defendant, and refused, propound the law, when taken as a whole, in accordance with the views already expressed, and need not be more particularly referred to or considered.

It only remains to say that the court did not err in refusing to set aside the verdict on the ground that the damages awarded were excessive. The evidence shows that the deceased left a widow and a number of children, and the question as to the quantum of damages, was a matter peculiarly within the province of the jury. In such a case, therefore, the verdict ought not to be set aside, unless the damages awarded are so excessive as to warrant the belief that the jury were influenced by prejudice or partiality, or were misled by some mistaken view of the merits of the case. *Farish v. Reigle*, 11 Grat. 697-722; *Benn v. Hatcher*, 81 Va. 25; *Railroad Co. v. Taffe*, 37 Ind. 373.

Damages not excessive.

The judgment is affirmed; Richardson, J., dissenting.

GALVESTON, HOUSTON, & SAN ANTONIO R. CO.

v.

RYON *et al.*

(*Texas Supreme Court, Feb. 21, 1888.*)

Trespasser on Track — Negligence — Duty of Company. — If a person who is injured negligently trespassed on a railroad track, and nothing has intervened to relieve the original act of trespass of its culpability, his negligence contributed directly to his injury, and the railroad company did not owe him the duty of keeping a lookout for his safety, although it would be liable if it had in fact discovered him on the track, and failed to use reasonable diligence to prevent the train from running over him.¹

APPEAL from District Court, Fort Bend County.

This suit was brought by the widow and five minor children of John Ryon, deceased, who was struck by an engine while on or near appellant's track, between stations and not at any cross-

¹ TRESPASSER ON TRACK. Liability for injury to. See *ante*, *Troy v. Cape Fear & Y. V. R. Co.*; *Virginia M. R. Co. v. White's Admr.*; *post* *Guenther v. St. Louis, I. M. & S. R. Co.*, and note.

ing, and so injured that he died. Verdict and judgment for \$13,722.50. The following outline of the facts and circumstances attending and surrounding the accident is extracted from appellee's brief, and adopted as correct: On the day he was killed, Ryon, who lived in Richmond, had been gathering corn on the Worthington farm, which lies adjoining and south of appellant's track, and about a mile east from Richmond. A public road leads from Worthington's farm, coming out of his gate crosses the railroad to the north side, and runs in a somewhat roundabout way to Richmond. A shorter way, used by the people around, is by a path from the gate which goes along the edge of the railroad ditch on its south side for some 400 yards, then enters inside the railroad fence, where there is a plank off, and crosses the track to the north, and, running inside the railroad fence, leads into the town, which is just west of the Brazos River. On the day in question it had been raining, and the dirt road, the longer route, was muddy and sticky, while the roadbed was high and dry. Leaving the farm, Ryon started home by way of the path, on foot, and was killed by the passenger-train on top of the embankment, where the path crosses from the south to the north side. An eye-witness stated, that, when struck by the engine, he was standing on the end of a cross-tie, on the south side, facing rather towards Richmond, scraping the mud from his feet, and looking down at his feet. Ryon was deaf, but could hear such a sound as the whistle of an engine, while he could not hear the roar and rumbling of a moving train. The train was moving rapidly, and was behind time. No signal of warning was given, nor was the speed of the train slackened; the train-men stating in excuse for this that no one of them saw Ryon, nor knew he was on the track until his body was flung up by the cow-catcher onto the pilot. From the Brazos-river bridge to where Ryon was killed is 550 yards, and is a straight, open stretch, so that one looking down the track from the bridge could not avoid seeing a man, or even a smaller object, if on the track where Ryon was struck. At the time of the injury the conductor was taking up tickets, the engineer was out on the engine oiling the cups, the fireman was shovelling coal, and no one was watching the track. Ryon was struck at a point just opposite his brother's butcher-pen, through whose field the railroad here runs, and 400 yards from the public crossing at Worthington's gate. It was shown, that, when the engineer is out on the engine, the fireman is in charge of the engine, and is charged with the duty of watching the track ahead; and it also appeared that from Richmond to the next station the railroad runs through farms and fields, with residences and cabins all along, while several public roads cross it

within that distance. The assignments of error relied on are as follows: "*First*, The verdict and judgment should have been for defendant, because the evidence is not sufficient in law to entitle the plaintiffs to recover; the undisputed facts showing that there was no negligence of defendant or its servants. *Second*, The verdict and judgment should have been for defendant, because the evidence is not sufficient in law to entitle plaintiffs to recover; the undisputed facts showing that Ryon was grossly negligent, and careless of his own safety, in going on, or standing or walking upon, the railroad track away from a station or public crossing, and where said track was fenced, without using his senses, or any precaution whatever, to preserve or protect himself in such dangerous position. *Third*, The court erred in giving the following charge asked by plaintiff's attorney: 'If you believe from the evidence in this case that in Fort Bend County, on or about Sept. 14, 1885, the defendant railway company's locomotive or engine, drawing defendant's train of cars, ran against and personally injured John B. Ryon, and that such personal injury caused said Ryon's death, and that such injury was caused by the gross negligence or carelessness of the servant or servants of defendant operating said train and locomotive (or engine), and that plaintiff is the widow of said Ryon, and the mother of his children, as alleged in her petition, then you will find a verdict for the plaintiff,' — because said charge submits to the jury an issue not raised by the evidence, there being no evidence in the case of gross negligence or carelessness of defendant or its servants. *Fourth*, The court erred in giving the following charge to the jury, asked by plaintiff's attorney: 'If you believe from the evidence that said Ryon, by his own negligence, contributed to his injury, you will find for the defendant; but, in considering the question of whether Ryon contributed to his own injury or not, if you believe that Ryon was guilty of negligence in going upon the track of defendant, but that this was the remote and not the proximate cause of his injury, and if you further believe from the evidence that the proximate cause of Ryon's injury was, that the defendant's servants, after it became known to them that Ryon was on the track, or after they might have known that he was there by the use of a reasonable watchfulness, and was in danger of being injured, did not use any care, or that they used such little care as to justify the belief that they were indifferent as to whether Ryon was hurt or not, to prevent the injury to Ryon, you will find for the plaintiff: that is to say, that, in order to charge the defendant with liability for the injury done to Ryon while Ryon was on defendant's track at a point between stations and not at a public crossing, you must believe from the evidence that defendant's employees in charge

of the engine and train had knowledge of, or by use of the slightest watchfulness might have comprehended, the situation, and have avoided the danger by the ordinary use of the means in their power, and that they failed to use those means to prevent the inflicting of the injury on Ryon,' because the question of remote or proximate cause does not arise out of the facts in evidence, and because it appears by the evidence, without dispute, that Ryon's presence on the track was not known to defendant's servants, and therefore the question whether they were indifferent as to whether Ryon was hurt or not, does not arise in the case, and because said charge puts the whole burden of care and responsibility for the preservation and safety of said Ryon upon defendant, without reference to the duty resting upon him to preserve and protect himself. *Fifth*, The court erred in giving the following charge, asked by plaintiff's attorney: 'Persons operating a railroad train, seeing a man on their track in the direction their train is going, have a right to presume that he will step off in time to avoid a collision; but even though such person be at the time a trespasser on the track, he is entitled to have some warning given him by the railway employees, — that is, such warning as would reasonably alarm his fears, and cause him to leave the track; and if those operating the train so see a person, and fail to give such reasonable warning, the railroad company would be liable for the injury, if any, inflicted on such person,' — because it appears by the evidence, without dispute, that defendant or its servants did not know that Ryon was on the track, and because said charge, even as an abstract proposition, is not a correct statement of the law. *Sixth*, The court erred in refusing the following charge asked by defendant: 'Between stations and public crossings, a railroad track belongs exclusively to the railroad company, and persons who ride or walk thereon are trespassers, and they do so subject to the risks incident to so hazardous an undertaking; and, if injured by a train of the company, there is no liability unless the injury is wilful.' *Seventh*, The court erred in refusing the following charge asked by defendant: 'If, from the evidence in this case, you believe that John Ryon, the party who is alleged to have been killed by defendant's train, was upon the track of defendant at a point between stations and public crossings, then said Ryon was a trespasser; and in order to render defendant liable in damages for his injury or death, it must be shown that defendant's servants, operating the train by which plaintiff alleges the said Ryon was killed, had knowledge of the peril in which said Ryon had placed himself, or the equivalent of such knowledge, at least long enough before the injury inflicted to have enabled them to form an intelligent opinion as to how the injury might

be avoided, and to apply the remedy.' *Tenth*, All foregoing matters were made grounds of a motion for a new trial, as well as the further ground that the verdict and judgment were contrary to the law and evidence, and without evidence to support them, and the court erred in not granting a new trial."

E. P. Hill for appellant.

Pearson & McCamly for appellees.

Recovery notwithstanding contributory negligence. MALTBIE, J. — The courts hold, almost without a dissent, that a person guilty of negligence contributing to his injury may recover, notwithstanding his own negligence, if the defendant, after discovering plaintiff's danger, fails to use ordinary care to avoid injuring him. But in general, where the defendant owes the plaintiff no duty, and is not aware of his danger, though the discovery might have been made by the exercise of ordinary prudence on the part of defendant, no recovery can be had. In *Sympkins's* case, 58 Tex. 615, it was held that if, after *Sympkins* went on the track of defendant, he was stricken down in a fit, and was thus run over by the train, that his negligence in going onto the track was only a remote cause of his injury; and that a providential occurrence intervening broke the causal connection between the original act of negligence and the injury, and that therefore the defendant would be liable for the injury if its servants failed to use ordinary diligence to discover the plaintiff while lying on the track in a helpless condition. In the case of *Railway Co. v. O'Donnell*, 58 Tex. 27; s. c., 10 Am. & Eng. R. R. Cas. 212, and other cases of infant trespassers, negligence was not imputed, on account of the want of discretion in such persons, and the roads were held liable on account of failing to use ordinary diligence to discover the person on its track, and prevent his injury; but no case in Texas has ever held a railroad company liable for failing to discover a sane man who was on its track without right, and under circumstances that rendered the act of being on it negligence contributing proximately to the injury. Negligence is, as a general rule, a question of fact, and often depends upon a variety of facts and circumstances. A person who trespasses upon the lands of another is not necessarily guilty of negligence. *Marble v. Ross*, 124 Mass. 44. Negligence is the opposite of prudence, and acts habitually done by prudent persons cannot be logically characterized as negligent. It is a fact widely known that prudent persons, as occasion may require, cross railroad tracks at places other than public crossings; and the mere fact that one may cross at such place would not make it negligent, though were he to do so when trains were approaching, or without looking and listening, it

would doubtless be an act of negligence. The Supreme Court of Wisconsin, in a case where a girl seven years old was injured in crossing a railroad track not at a public crossing, after observing that negligence is generally a question of fact, use this language, which meets with our approval: "The plaintiff also offered to prove, in effect, that persons living near the track west of the depot, and other people, men and women and children, had, for some years immediately before the accident, been in the habit of pacing back and forth — up and down — on the same pathway and in the same direction where the little girl went at the time she was hurt, and that they had been so accustomed to pass daily and hourly for several years, all of which was excluded. This excluded evidence," the court say, "tended to prove an implied consent or license on the part of defendant that persons might pass on foot along the switch-path, and across the side track, to the public street; and the mere fact that other children had been ordered off the track would not conclusively prove that no such consent or license had been given. If such custom existed, and men, women, and children were daily and hourly passing over the same pathway, it certainly had an important bearing, not only on the question of whether Rosa was guilty of contributory negligence, but whether defendant was exercising ordinary care at the time." *Townley v. Railway Co.*, 4 Am. & Eng. R. R. Cas. 567.

John Ryon, the husband and father of appellees, died of injuries inflicted by appellant's engine while he was standing on the end of a cross-tie, looking at his feet, and scraping the mud off of them. The accident occurred in **Facts stated.** Fort Bend County, on the east side of the Brazos River, 550 yards from the railroad bridge, and 400 yards from where the railroad crosses the public road at Worthington's. From the Brazos-river bridge to where Ryon was killed, the ground is open, level, and unobstructed, and a person could be easily seen at that point from the bridge; and an engine at the bridge could also have been plainly seen from that point. Ryon was a farmer residing at Richmond, on the west side of the river; had been at work that day in a field south of the place where he was killed, and was then on his way home. It had been raining, and the road to Richmond was muddy and rather circuitous. There was a nearer and dryer route over a foot-path along the grade, which Ryon had been travelling, and which crossed the track at the place where he stopped to clean the mud off of his shoes. The train was behind time; was running at from 22 to 25 miles an hour, which was faster than usual. No whistle was blown or bell rung on this occasion. The time from the bridge to where the accident occurred, at 25 miles an hour, was about 35 seconds.

Ryon was partially deaf; could not hear the rumbling of the train, but could hear a whistle or the ringing of a bell. His route was through cultivated fields, and there were several houses between where he was hurt and Richmond. The track along where the path ran was fenced, but a plank had been knocked off, and persons passed through the opening when travelling the path. No one saw Ryon when he was struck by the engine; but he was seen walking along, a very short while before, by the side of the track. It was in evidence that the fireman, engineer, and conductor were engaged at their several duties from the time the train arrived at the bridge until after the accident occurred, and that none of them discovered Ryon until after he was injured, for the reason that none of them looked ahead. Upon this state of facts, the court, among other things, charged the jury as follows: "If you believe from the evidence that said Ryon, by his own negligence, contributed to his injury, you will find for the defendant; but, in considering the question whether Ryon contributed to his own injury or not, if you believe that Ryon was guilty of negligence in going upon the track of defendant, but that this was the remote but not the proximate cause of his injury, and if you further believe from the evidence that the proximate cause of Ryon's injury was that defendant's servants, after it became known to them that Ryon was on the track, or after they might have known he was there by reasonable watchfulness, and was in danger of being injured, did not use any care, or that they used such little care as to justify the belief that they were indifferent whether Ryon was hurt or not, to prevent the injury to Ryon, you will find for the plaintiffs." We think that in so far as this charge asserts the proposition, that, if Ryon was guilty of negligence in going onto defendant's track, the defendant would be answerable in damages for failure to discover that he was on it, there was error. For if Ryon was negligent in going upon the track, nothing having intervened from that time until the accident occurred to relieve the original act of its culpability, as in the Sympkins case, his negligence contributed directly to his injury, and defendant did not owe him the duty of keeping a lookout for his safety, although it would have been liable if it had, in fact, discovered Ryon on its track, and had failed to use reasonable diligence to prevent the train from running over him. There was no evidence at all that defendant's servants ever saw Ryon on the track, and the submission of such theory to the jury was, for that reason, an error. If Ryon was guilty of negligence in going upon the track, — and upon this issue we express no opinion, — appellees cannot recover upon the facts of this case.

We are of the opinion that for the errors in the charge the judgment should be reversed, and the cause remanded.

NICHOLS'S ADMR.

v.

LOUISVILLE & NASHVILLE R. Co.

(Kentucky Supreme Court, Jan. 10, 1888.)

Trespasser on Track — Deaf Mute — Liability for Death. — If the engineer, on observing a person on the track at a place where he has no right to be, rings the bell and blows the whistle, so that any ordinary person must be aware of the approach of the train, he has a right to expect the trespasser to leave the track; and the company will not be liable for his death, even though the engineer when he first saw him had time to stop the train, and the trespasser was a deaf mute.

APPEAL from Circuit Court, Nelson County.

Action against the Louisville & Nashville Railroad Company, brought by the administrator of Thomas Nichols to recover damages for the death of the intestate.

The opinion states the facts.

George S. Fulton for appellant.

William Johnson for appellee.

PRYOR, C. J. — The appellant's intestate was run over and killed by a freight-train of the appellee, and it is claimed that it was caused by the wilful neglect of the employees on the train. The intestate was a deaf mute, and walking on appellee's road, about four hundred yards from Samuel's depot, with his back to the approaching train. The regular signal of blowing the whistle and ringing the bell was made as the train approached the depot, and one having the sense of hearing could and must have known that a train was approaching. It was moving at the rate of twelve or fourteen miles an hour; and another person, being on the road between the depot and where the unfortunate man was killed, stepped off the track as the train approached, but the deceased paid no attention to it whatever. The engineer, as he neared the man, called to him to leave the track, and blew the whistle for down brakes; but the car was then so near as to render it impossible to check its progress so as to save the life of the deceased.

Facts.

That the engineer doubtless saw him, or could have seen him, in time to stop the train, is manifest; but the deceased was on the track of the road where there was no crossing, and where he had no right to be, with the ground level on each side of the track, so that he might have stepped off without the least trouble; and under such circum-

No recovery
allowed.

stances the engineer had the right to presume that he would abandon the track of the road for his own security. Any man with his senses about him would have left the track; in fact, there was the highest degree of neglect on the part of the deaf mute in going upon the railroad track where trains were constantly passing, and using it as a foot-path for his own convenience. His death was the result of his own folly, and the court below acted properly in giving the peremptory instruction. Judgment affirmed.

Trespassers on Track. — See *post*, *Kennedy v. Denver, S. P. & P. R. Co.*, and note; *Guenther v. St. Louis, I. M. & S. R. Co.*, and note.

Injury to Deaf Mute. — It is well established that negligence is not to be imputed to persons bereft of their senses, such as the deaf or the blind, on account of their failure to use senses which they do not possess; yet if such a person, knowing of his infirmity, places himself in a position in which danger is probable, without means on his part to avoid it, such act will prevent a recovery in case of injury. See *Centralia v. Krouse*, 64 Ill. 19; *Illinois C. R. Co. v. Buckner*, 28 Ill. 299; *Winn v. Lowell*, 83 Mass. (1 Allen) 177; *Zimmerman v. Hannibal & St. J. R. Co.*, 72 Mo. 168; s. c., 2 Am. & Eng. R. R. Cas. 191; *Sleeper v. Sanborn*, 52 N. H. 244; *Davenport v. Ruckman*, 37 N. Y. 568; *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570; *Ormsbee v. Boston, etc., R. Co.*, 14 R. I. 102.

Partial Deafness will not excuse a person from the full measure of care which prudent persons partially deaf, conscious of their infirmity, usually take for their safety (*Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570); yet such an infirmity in a person injured, though unknown to the servants of the railroad company, is a circumstance so connected with the infliction and receipt of the injury, that it cannot, in the progress of the trial, be rightfully excluded from the jury; but the court should see that such circumstance is properly used by the party giving it in evidence. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570. The Supreme Court of Missouri, however, say, in the case of *Purl v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 168, 172; s. c., 6 Am. & Eng. R. R. Cas. 27, that "the case is not altered, nor does it become more favorable to the plaintiff, by reason of his deafness. Such an affliction, so far from excusing one who might have seen the train, should rather add a spur to his vigilance, and prompt him to employ his other faculties so as to compensate, as far as possible, for the lacking one:" citing 1 Thompson on Neg. 430; Shrem. & Red. on Neg. sect. 488.

Deaf Person walking along Track. — It is said in *Cogswell v. Oregon & C. R. Co.*, 6 Oreg. 417, that it is gross negligence for one who is deaf to walk laterally along the track of a railroad, where trains are liable to pass. And it is well settled that the servants of a railroad company in charge of a train have a right to presume that a person walking upon the track is of sound mind and good hearing (*Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. C. C. 579, 582), and to presume that he will leave the track at the last moment, at least, before being struck; and it may be regarded as established law that those in charge of the train have a right to act upon such presumption till it might be too late to avoid contact. See *Indianapolis & V. R. Co. v. McClaren*, 62 Ind. 566, 572; *Citizens' R. Co. v. Carey*, 56 Ind. 396; *Terre Haute R. Co. v. Graham*, 46 Ind. 239; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Lafayette R. Co. v. Huffman*, 28 Ind. 287; *Lafayette R. Co. v. Adams*, 26 Ind. 76; *Mullhessin v. Delaware R. Co.*, 81 Pa. St. 366.

Partial deafness will not increase the responsibility of a railroad company,

or in any way affect the care necessary to be used by them, where the servants of the company had no notice or knowledge of such infirmity. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 572. Thus, in *Laicher v. New Orleans, J. & G. N. R. Co.*, 28 La. An. 320, the plaintiff's son, who was to some extent deaf, was walking on the railroad track outside of the rails, stepping from one cross-tie to another, when the train was approaching him from behind; he was struck with great violence, and severely injured. The court held, that, conceding that there was a want of proper prudence and care on the part of the employees of the company in giving the usual signals of the approach of the train, yet the negligence on the part of the young man in walking along the cross-ties, and taking no care to look back or get off the track, was such negligence as to preclude recovery.

But if a person upon the track is known to the servants of the company in charge of the train to be a deaf and dumb man, then the company will be held to a greater degree of care. See *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. C. C. 579, 582. *International & Great N. R. Co. v. Smith*, 62 Tex. 185; s. c., 19 Am. & Eng. R. R. Cas. 21.

Deaf Man crossing Track. — A deaf person attempting to cross a railroad track is held to a greater degree of care and caution than one in full possession of his senses; because his infirmity renders him less able to detect the approach of a train, and less able to protect himself from injury. Thus, it has been held to be negligence for a deaf person to attempt to drive an unmanageable horse across a railroad track when a train is approaching; that it is his duty to keep a lookout, and avoid danger. In such a case it is no excuse that the horse rushed up the track near the crossing, or was driven there to avoid the engine. *Illinois C. R. Co. v. Buckner*, 28 Ill. 299. And in *Purl v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 168; s. c., 6 Am. & Eng. R. R. Cas. 27, the plaintiff, a deaf man, being about to cross the railroad track in a buggy, saw the smoke of what he took to be a moving train east of him, but attempted to cross without looking for the train, and was struck by the locomotive; the court held that the accident was the result of his own negligence, and that the railroad company was not liable. See, for the Missouri rule in such case, *Henze v. St. Louis K. C. & N. R. Co.*, 71 Mo. 636; *Moody v. Pacific R. Co.*, 68 Mo. 472; *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484; *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480. See also *Chicago & N. E. R. Co. v. Miller*, 46 Mich. 532; s. c., 6 Am. & Eng. R. R. Cas. 89; *Johnson v. Louisville & N. R. Co.*, 13 Am. & Eng. R. R. Cas. 623.

Crossing Track with Muffled Ears. — It has been held that a person crossing a railroad track who could have seen the cars approach, had he been looking, but who turned his back in the direction from which the train was coming, and had his ears so bandaged that he could not hear, is guilty of such negligence as will prevent his recovery for injuries resulting from colliding with the train, unless he can prove a greater degree of negligence on the part of the railroad company. *Chicago & R. I. R. Co. v. Still*, 18 Ill. 499.

KENNEDY

v.

DENVER, SOUTH PARK, & PACIFIC R. R. Co.

(Colorado Supreme Court.)

Trespasser on Track — Deafness — Notice to Conductor. — In an action against a railroad company to recover for personal injuries sustained by plaintiff, it appeared that the train struck him from behind; that he knew nothing of its presence until struck; that his hearing was defective, but he was not aware of the extent of the defect; and that the whistle was blown. He offered testimony that his son, who was aboard the train, had informed the conductor that plaintiff was travelling along the track, and was deaf or partially so; but the court excluded the evidence, and allowed a nonsuit. On appeal, *held*, that the plaintiff's own evidence established contributory negligence on his part; that, had the testimony been admitted, a *prima facie* case of gross negligence or wantonness, requiring a submission to the jury, would not have been made; and that there was no ground for reversal. Beck, C. J., dissents.

ERROR in District Court, Jefferson County.

On the 27th of January, 1883, plaintiff, George O. Kennedy, while walking in the day-time upon defendant's railroad track, was struck by the locomotive attached to the freight-train, and seriously injured. The train approached him from behind, and he knew nothing of its presence until struck. He was aware that his hearing was defective, but was not aware of the extent of such defect. In going upon the track at Dawson's switch station, he looked for trains, but made no inquiry concerning them. He had previously passed over the same track, and had always recognized without difficulty the presence of trains before they came in sight. The view was unobstructed for a distance of nine hundred feet back of the spot where plaintiff was injured. Just prior to the accident the whistle blew six or seven times, — quick, short blasts, winding up with a long, steady blow. Shortly afterwards the engine and caboose returned to the station, bringing plaintiff. The conductor went to one Rutherford, who lived near by, for aid, and remarked that he had caught that man; promising to send a physician that evening. The vacuum air-brake was in use on the train, and the train could have been stopped in a distance of from 125 to 150 feet. This action was brought to recover damages for the injuries thus inflicted.

At the trial, the court below rejected the following evidence, offered to be proved by the plaintiff's son, and also, substantially, by one other witness. That he (the son) went to the conductor of the train the day of the injury, and told the conductor that his

father, the plaintiff, had, five or ten minutes previously, started to walk along defendant's track to Dome Rock; also that his father was deaf, or partially so, and that he asked the conductor, on account of such deafness, to look out for him, and not run over him; that this was done in the presence and hearing of the two brakemen of said train and of one Rutherford; and that the conductor there and then replied, that, if the plaintiff was deaf, he had no business on the track, and would get killed or run over. The witness was permitted to state, that, after the conversation alluded to, the train started up, and the conductor went into the caboose. The following rules of the defendant company for its employees were received in evidence: "Rule 37. In case where there is any room to doubt as to the safety of proceeding from any cause, adopt the safe course." "Rule 39. The conductor will have charge of the train and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in either of which cases the engineer will be held alike accountable." At the conclusion of plaintiff's evidence, defendant moved for a nonsuit, which the court allowed, and to review the final judgment entered thereon, the present writ of error was sued out.

A. H. De France and S. E. Browne for plaintiff in error.

Teller & Orahood for defendant in error.

PER CURIAM. — The rulings challenged by the first three assignments of error were correct, and the assignments will not be discussed.

Conceding that the testimony concerning notice to the conductor, and the latter's remark, should have been received in evidence, and that the court's action in excluding the same was error, we still think there is not sufficient ground for reversal. Plaintiff was a man of mature years, of sound mind, and perfect eyesight. He was in the possession of unimpaired physical activity and strength. His only defect was that of being partially deaf. Of this defect he was aware, though perhaps he did not know its extent. Without inquiry about defendant's trains, he voluntarily went upon its track, and was walking thereon when the accident occurred. It was in the day-time, and the road-bed for nine hundred feet behind him was in full view. Prior to the accident, the whistle was blown six or seven times in short, sharp blasts, excepting the last, which was a prolonged blast. Plaintiff's own evidence clearly establishes contributory negligence on his part. Therefore, under a well-known legal principle, before he could recover, it became necessary for him to show gross negligence or wanton-

Plaintiff's
negligence
bars recovery.

ness on the part of the employees operating the train. Railroad Co. v. Holmes, 5 Colo. 197 ; s. c., 8 Am. & Eng. R. R. Cas. 410 ; Railroad Co. v. Cranmer, 4 Colo. 524. Aside from the fact of the accident itself, and the testimony offered but excluded, there is nothing in the case to show that the injury was the result of such negligence or wantonness. We cannot presume that plaintiff would have offered other or further proofs, had the rejected testimony been received ; and, considering this testimony in connection with the other evidence, it does not appear but that the train was operated with the care required, under all the circumstances. Had the court admitted this testimony, we are of the opinion that a *prima facie* case of gross negligence or wantonness, requiring a submission to the jury, would not have been made.

The judgment is affirmed.

BECK, C. J. (*dissenting*). — The plaintiff was guilty of negligence, but he was not as reckless as the court seems to suppose.

Facts stated. He went upon defendant's railroad track at Dawson's switch to walk to Dome Rock, without making inquiries at the former point as to the time of the passage of trains. But the reason assigned for this is, that he saw no one there to make inquiries of. There was no footway or path between the points mentioned ; but wherever the ground alongside the railroad track was smooth enough, which was about one-fourth the whole distance travelled by him, he would leave the track, and walk by the side of it. Every time he went upon the track, he looked for trains. He knew his hearing was defective ; but he did not know the extent of the defect, having previously walked on the same track, and heard the approach of trains, — how recently, he was not permitted to state. At this time, however, his hearing was so bad he did not hear the engineer's whistle, and the consequence was, the engine struck and injured him. The foregoing items might be immaterial, in a legal point of view, if the officer

Effect of knowledge of plaintiff's deafness. in command of the train which run down the plaintiff had not been notified of his defective hearing. In this connection they are material. The complaint charges that the employees of the defendant in charge of the train well knew the plaintiff was walking on

the track in front of the train, going in the same direction, and that he was almost entirely deaf. Upon such a state of facts, I am of opinion that a greater degree of care was due from the men in charge of the train than if no notice of the situation and condition of the plaintiff had come to them. Without such knowledge, the six or seven short, sharp blasts of the whistle, ending in a prolonged blast, may have been held to constitute ordinary care ; but with this knowledge, the engineer had good opportunity to prevent an accident.

Very respectable authorities have held that walking on a railroad track is not negligence *per se*, and that, in case of injury ensuing, the question of negligence as to the act is one proper to go to the jury. *Hassenmeyer v. Railroad Co.*, 48 Mich. 205; s. c., 6 Am. & Eng. R. R. Cas. 59; *Johnson v. Railway Co.*, 56 Wis. 274; s. c., 18 Am. & Eng. R. R. Cas. 471; *Carter v. Railroad Co.*, 19 S. C. 20; s. c., 15 Am. & Eng. R. R. Cas. 414; *Gothard v. Railroad Co.*, 67 Ala. 114. If this be so in an ordinary case, where the party injured is in possession of all his faculties, the peculiar circumstances of this case, considered in connection with the knowledge possessed by the conductor of the train, would seem to warrant the same legal conclusion.

Going on
track not neg-
ligence *per se*.

The trial having been to a jury, the plaintiff was entitled, under the law, to have produced in evidence all facts legally tending to show lack of ordinary care, recklessness, or wilful negligence on the part of the defendant's agents. The refusal of the trial court to admit testimony of this character, offered by the plaintiff, was error, and it is my opinion that the judgment of nonsuit was also error.

Evidence to
show defend-
ant's want of
care. Admissi-
bility.

Aside from abandonment of an action or consent of the plaintiff, the Civil Code permits a nonsuit, on motion of the defendant, only when the plaintiff fails to prove a sufficient case for the jury. Civil Code, p. 57, sect. 148. I do not say that the testimony introduced and offered made out a clear case for recovery in favor of the plaintiff. Whether he would have been entitled to a judgment for damages is a close question; but my dissent is based on the proposition that the plaintiff was wrongfully deprived of legitimate testimony offered by him in the first place, and wrongfully deprived of the consideration and judgment of the jury upon his whole case in the second place. Cases often arise, and this is an example of the class, in which there is room for difference of opinion as to the inferences and conclusions which may be drawn from the existing facts. In such cases, it is the province of the jury, and not of the judge, to find the facts, to make the proper inferences, and to deduce the proper conclusions therefrom. This is to be done under instructions from the court as to the principles of law applicable to the case.

It is a general rule, that contributory negligence on the part of the plaintiff will defeat an action for injuries caused by the negligence of the defendant, but it is a sound and well-established rule of law that contributory negligence is no bar to an action for a wilful injury. *Kenyon v. Railroad Co.*, 5 Hun, 479; *Green v. Railroad Co.*, 11 Hun, 333, and cases cited. A technical trespass is held not to deprive the trespasser of his rights to recover

Defendant's
liability not-
withstanding
contributory
negligence.

damages for an injury which he suffers through the wilful negligence of another. Shear. & R. Neg. sect. 36; Thomp. Neg. sect. 1162; Whart. Neg. sect. 344 *et seq.*; Isabel *v.* Railroad Co., 60 Mo. 475; Meeks *v.* Railroad Co., 56 Cal. 519; s. c., 8 Am. & Eng. R. R. Cas. 314, and cases cited; Railroad Co. *v.* Miller, 25 Mich. 279; Railroad Co. *v.* Neubeur, 62 Md. 398. Says the author of Beach on Contributory Negligence, sect. 18, "When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me, and inflicts the injury upon me as the result of his negligence, there is very little room for a claim that such conduct on his part is not wilful negligence." The foregoing principles of law appear to have been ignored in the trial of this case. One of the offers of proof made, and rejected by the court, was as follows: "The plaintiff then offered to prove by the witness on the stand that on the twenty-seventh day of January, A.D. 1883, the day on which the alleged injury occurred, he went to the conductor of the train doing the injury, and told the conductor that his father, the plaintiff, had just started down the railroad track on which said train was then standing, to Dome Rock, about five or ten minutes before the time of his telling the conductor the same, to walk along the track to Dome Rock, the same being defendant's track; that he also told the conductor that his father, the plaintiff, was deaf, or partially so, and asked the conductor to look out for him, and not run over him, because he was deaf; that this was done in the presence and hearing of the brakemen of said train and one Edward J. Rutherford; and that the conductor then and there replied, 'that, if the plaintiff was deaf, he had no business on the track, and would get killed or run over.'" The testimony shows that the train causing the injury was a freight-train, with a caboose attached to the rear end, and that the train was from 180 to 200 feet in length. On starting from Dawson's switch, the conductor, without communicating with the engineer, it appears, took his seat in the rear car. The train had gone 3,426.4 feet, or about five-eighths of a mile, when the engine struck and seriously injured the plaintiff. The indications are, that no attention was paid to the notice given the conductor. There was a clear stretch of 900 feet in which he could be seen from the train before the engine struck him. The train could have been stopped, by the application of the vacuum air-brakes, in a distance of from 125 to 150 feet. The facts proved, and offered to be proved, therefore, constitute a chain of circumstances affording room for difference of opinion as to the inferences and conclusions which might be drawn therefrom. Some of the facts alleged in this case are the subject of inference from other facts and circumstances shown

Offers of
proof rejected.
Facts.

or offered to be proven as the inference concerning the failure of the conductor to take any precautions to prevent injuring the plaintiff. The question of negligence, in such a case, is not a question of law for the court; but it is the exclusive province of the jury to consider and weigh the testimony, to find the facts, make the proper inferences, and to draw the proper conclusions therefrom. *1 Phil. Ev. 599; Nelson v. Railway Co., 60 Wis. 323; Ernst v. Railroad Co., 35 N. Y. 38; Railroad Co. v. Stout, 17 Wall. 657.* The facts concerning the notice given the conductor at Dawson's switch, his words and conduct, should have been admitted in evidence; and it should have been left to the jury to determine, under proper instructions from the court, whether the agents of the defendant exercised ordinary care, under the circumstances of this case, to avoid the catastrophe, or whether the injury to the plaintiff was the result of their wilful negligence.

Same. Negligence a question for jury.

It is held that an engineer who sees a man walking upon the track, and is not aware that he is deaf, or insensible of danger from any cause, has a right to presume that he will get off in time to escape injury. But this presumption does not exist in the case of a child of tender years, or of a person known to be deaf or otherwise insensible of danger. His duty in the latter case is to take such precautions as are reasonably necessary to prevent disaster, even to stopping his train. *Whart. Neg. sect. 389; Railroad Co. v. Miller, 25 Mich. 279.* Even a drunken man is said not to be so far beyond the pale of the law that he may be injured with impunity. *O'Keefe v. Railroad Co., 32 Iowa, 467; Whalen v. Railway Co., 60 Mo. 323.* This court said, in *Railway Co. v. Ward, 4 Colo. 30-34*, "Notwithstanding the company's exclusive right of the use of its roadway, it is still bound to use ordinary care to avoid injury to persons who may be upon or near its track. What is ordinary care is to be measured, not only by the dangerous forces put in motion, but by the special circumstances of time and place." In *Railway Co. v. Cranmer, 4 Colo. 524*, it was said, "The plaintiff, even though a trespasser on the track, may recover, if the defendant, with knowledge of his danger, failed to exercise ordinary care to prevent it;" citing the following paragraph from *Shear. & R. Neg. sect. 36*: "It is now well settled that a plaintiff may recover, notwithstanding his own negligence exposed him to risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him." In *Behrens v. Railway Co., 5 Colo. 400; s. c., 8 Am. & Eng. R. R. Cas. 184*, it was held that a nonsuit was proper when it affirmatively appeared from the plaintiff's evidence that he was guilty of con-

Defendant's duty to trespasser. Deafness.

When nonsuit is proper.

tributory negligence which was the proximate cause of the injury. That this ruling was not intended to excuse a case of wilful negligence is evident from the remark of the court, in commenting upon the case cited: "But the fact that the latter was a trespasser gave the railroad company no license to run its engine over him." In *Railroad Co. v. Martin*, 7 Colo. 592; s. c., 17 Am. & Eng. R. R. Cas. 592, we recognize the rule, that where the conclusion from the evidence is fairly debatable, or rests in doubt, the question of negligence is always for the jury. To warrant the court in instructing the jury that a party is guilty of negligence, a case must be such as to allow no other inference from the evidence; and that, if a question depends upon a state of facts from which different minds may honestly draw different conclusions, the question must be submitted to the jury. That case also recognizes the rule, that when the plaintiff so far contributes to the disaster by his own neglect, or want of ordinary care and caution, as that, but for such neglect or want of care and caution on his part, the misfortune would not have happened, he is not entitled to recover. This latter rule is not applicable in a case where the proximate cause of the injury arises from the wilful neglect of the defendant, or the failure on his part to exercise ordinary care to avoid the accident; reference being had to the circumstances of the case.

Referring, now, to the circumstances of the case before us, the conductor was the officer in charge of the train. His reply to the son of the plaintiff, when informed by the latter that his deaf father had started down the track a few minutes in advance of the train, accompanied by the request not to run over him, considered in connection with his conduct in seating himself in the rear car, without communicating with the engineer, certainly indicated indifference to the fate of the plaintiff. His further remark, made a few minutes later, to the witness Rutherford, on returning with the plaintiff in his mangled condition, "that he had caught that man," was apparently quite as indifferent and heartless. In view of the conduct and speeches of this officer, and of the fact that the plaintiff was run down by his train when it could have been so quickly slowed up or stopped, the jury might have been warranted, in the absence of other and contrary evidence, in drawing the inference that he failed to take any precautions to avoid the disaster. Presumptions of fact are derived directly from the circumstances of the particular case by reasoning from the common experience of mankind; and this process of ascertaining one fact from the existence of another is said to fall exclusively within the province of the jury. 1 Greenl. Ev. sects. 33, 44, 48. The case being left to the jury, it might have rationally inferred from the circum-

Same. Facts
examined.

stances mentioned that the injury done to the plaintiff was the result of wilful negligence on the part of the defendant.

For the foregoing reasons, I am of opinion that the judgment should be reversed, and the cause remanded for a new trial.

Trespasser upon Track. — See *ante*, *Troy v. Cape Fear & Y. V. R. Co.*; *Virginia M. R. Co. v. White's Admr.*; *Galveston, H. & S. A. R. Co. v. Ryon*; *Nichols's Admr. v. Louisville & N. R. Co.*; *post*, *Guenther v. St. Louis, I. M. & S. R. Co.*; *Schilling v. Chicago, M. & St. P. R. Co.*; *Houston v. Vicksburg, S. & P. R. Co.*; *Hughes v. Galveston, H. & S. A. R. Co.*; *Donnelly v. Brooklyn City R. Co.*

Injury to Deaf Mute. — For a full discussion of the liabilities of a railroad company for injuries to a deaf person walking laterally along a railroad track, or endeavoring to cross it, see *ante*, *Nichols's Admr. v. Louisville & N. R. Co.*, and note.

GUENTHER

v.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN R. CO.

(*Missouri Supreme Court, May 21, 1888.*)

Trespasser on Track — Personal Injuries — Contributory Negligence. — In an action against a railroad company to recover damages for negligently killing plaintiff's husband, it appeared that deceased, a man of mature years, who passed the point on the track where he was struck, daily, going to his work, and who must have known that a train was due about that time, instead of walking between the two tracks, stepped in broad daylight upon one of the tracks, the view of which was unobstructed for several hundred yards, and continued to walk on it without looking or listening for an approaching train, or paying any attention whatever to his situation. *Held*, that deceased was guilty of such negligence, contributing directly to his death, as would prevent a recovery, unless it appeared that after deceased had, by his negligence, exposed himself to peril, the defendant's servants became aware of his perilous position, or by the exercise of ordinary care might have discovered it, in time to prevent injuring him, and thereafter, immediately before and up to the time of actual collision, failed to use such means as were within their power, with a proper degree of care, consistent with the safety of those on board the train, to avoid injuring him.

Same — Failure to ring Bell. — Although it should appear that the defendant's employees in charge of the train failed to ring the bell, and that the place where the accident occurred was frequented by people who were in the habit of using the track for the purpose of foot-travel, the company is not rendered liable thereby, if the accident was merely caused by the concurrent acts of the defendant's negligence in failing to ring the bell, and of the deceased's contributory negligence in being on the track without paying any heed to passing trains.

APPEAL from St. Louis Circuit Court.

Action by Elizabeth Guenther against the St. Louis, Iron Mountain, & Southern Railway Company to recover damages for negligently killing her husband.

The opinion states the case.

Bennett Pike for appellant.

Leo Rassieur and *Dexter Tiffany* for respondent.

BRACE, J. — This is an action in which plaintiff seeks to recover damages for the alleged negligence of defendant in running its locomotive and cars over her husband, Jacob Guenther, and killing him. The answer of the defendant contained a general denial and a plea of contributory negligence. The reply of plaintiff to the answer was a general denial. At the close of plaintiff's evidence in chief, a demurrer to the evidence was interposed, which being overruled, the defendant then introduced its evidence, and the case was submitted to the jury under the instructions of the court, a verdict rendered for the plaintiff, and from the judgment entered thereon the defendant, after an unsuccessful effort for a new trial, appeals, and assigns for error the refusal of the court to sustain the demurrer to the evidence, the admission of improper evidence for the plaintiff, the giving of improper instructions for the plaintiff, and refusing proper instructions for the defendant.

The defendant is not in position to urge the overruling of the demurrer to the evidence as reversible error, having waived the same by putting in its own evidence; and the case will have to be examined and determined upon the whole evidence in the case. *Bowen v. Railway Co.* (decided at this term).

It appears from the evidence, that about seven o'clock on the morning of the 13th of August, 1884, the deceased, while walking southwardly on the defendant's track, at a point within the limits of the city of St. Louis, about three miles south of the Union depot, was struck by the Carondelet accommodation-train running south; that he was thrown from the track, and died the same day; that the train was about on time,—perhaps a few minutes late,—and running at the rate of from 15 to 20 miles an hour; that there is a plain and unobstructed view of the track for 500 yards or more north of the point where the collision took place. The evidence of the plaintiff tended to prove that on the train, while moving over this distance, no bell was rung, and no whistle sounded, till at the moment when Guenther was struck. The evidence of the defendant tended to show that the bell was being continually rung on the engine during the whole time the train was moving to the moment when deceased was struck. At the point of collision the defendant has two tracks on its roadbed,—the eastern track used by trains going north; the western track, by trains going south. The deceased was struck on the western track. Between these two tracks there is a space from five to eight feet. The road-bed is located

along the western bank of the Mississippi River ; and in the bluff west of the road-bed, and adjacent to it, a number of quarries have for a number of years been operated. Between the road-bed and these quarries a dirt road, on the average about four feet lower than the railroad bed, has for a number of years been used by the quarry teams ; and for a like period the workmen, in passing on foot to and from their work, as well as other pedestrians, used the road-bed, — the walk there being level, and better than the dirt road below ; and about seven o'clock in the morning it was customary to find quite a number of people passing along the road-bed at this point. Defendant's road-bed was constructed on a strip of land conveyed to it for a right of way in the year 1856, and originally sustained but one track. In 1859 the owners of the land over which the defendant's easement was granted, laid off that part of the tract lying west of the road-bed into lots and blocks divided by streets, and located on the plat a street 40 feet wide, running parallel with the west side of the railroad track, and filed and recorded a deed of dedication thereof to public uses. This street was afterwards recognized by the city on its plats, but was never improved or definitely located on the ground, so far as the evidence shows ; nor was it built upon as a street, or used as such, except, as hereinbefore stated, in connection with the dirt road mentioned and the defendant's road-bed. This street, thus laid off, was the terminus of the streets running east and west on the plat ; none of them crossing it. About the year 1873 the defendant laid the second track on its road-bed ; and there was evidence tending to show, that, in doing so, the western track was pushed west of its original location in some places along where the accident occurred, to make room for the eastern track : and it is contended for the plaintiff that the collision took place within the limits of this platted street ; and by the defendant, within the limits of its right of way. The evidence on this subject is very vague and unsatisfactory ; nor, in the view we take of this case, do we think it very important to determine which is right. The negligence, if any, of either plaintiff or defendant, is to be measured by the condition of things at the place where the accident took place, as they were known to exist by each of them at the time the acts of each are complained of as being negligent, and those acts cannot be affected one way or the other by the existence of a fact which could be determined only by an accurate survey ; and neither of the parties would have been a whit more or less negligent if, on such survey, the true line of division between the road-bed and street should happen to fall on the one or the other side of the exact spot where the deceased was struck, or if it should turn out that the streetway

and roadway lapped, and that that spot was both within the limits of defendant's right of way and also of the platted street. It further appeared from the evidence, that there was no public crossing at or near the place where Guenther was struck, and no improved streets within two or three blocks thereof. The evidence of the plaintiff failed to show the place at which the deceased entered upon the track, but tended to show that he had been walking between the rails on the western track, without looking back or paying any attention to the approach of trains from the north, for a distance of 75 or 100 yards; and that he was thus walking when the train that struck him was approaching him at a distance of 500 yards upon the road, and continued to do so until he was struck. The evidence of the defendant tended to show, that the deceased was walking in the space between the east and west tracks until the engine approached within 70 to 90 feet of him, when he stepped on the west track, and was almost immediately struck by the engine; that, as soon as he stepped on the track, every thing was done that could be done to stop the train, but it could not be stopped in time to prevent striking him; that the train, running at the rate of 15 miles an hour, could not be stopped in less than 180 to 190 feet.

In view of the first instruction given by the court on its own motion, many of the objections urged to the action of the court in refusing instructions asked for in behalf of the defendant are

Instructions. obviated, as it is not perceived how, in the light of that instruction, the refusal of the court to give them could have operated to the prejudice of defendant's case. A consideration of instructions numbered 1, 2, 3, and 5, given by the court on its own motion, in connection with defendant's instruction No. 13, will be sufficient for the disposition of the case. Those instructions are as follows. Instructions given: "(1) The court instructs you that the deceased, Jacob Guenther, was guilty of negligence in failing to take ordinary care to notice the train that struck him. Hence your duty as jurors requires you to find a verdict for defendant, unless you find the other facts relating to this case to be as set forth in instructions 2 or 3. (2) If the jury believe from the evidence, that, at the time of the accident, the place where the injury occurred to Jacob Guenther was a travelled public road or street, and had been used as a public road, highway, or thoroughfare for twenty years prior thereto, then the court declares the law to be, that it was the duty of the servants of the defendant to keep ringing the bell of the locomotive while the train was passing over said road or street, and for a distance of eighty rods before reaching the place of the accident; and if it appears from the evidence that no bell was rung while the locomotive was so passing over said street or road at

the time of and immediately before the accident, then the jury may infer negligence or carelessness in the agents or employees of the defendant in the running and managing of said train; and if you further find from the evidence, that the death of said Jacob Guenther was directly occasioned by or directly resulted from said omission to so sound the bell as aforesaid, then you should return a verdict for the plaintiff. (3) If you find from the evidence that said train of defendant that struck deceased could have been stopped by the employees of the defendant in charge of said train, by the exercise of ordinary care on their part, in time to have prevented his injury after they (said employees) became aware, or might have become aware by the exercise of ordinary care, of his imminent peril of being struck by said train, then you should return a verdict for the plaintiff.

. . . (5) If you find, in view of the other instructions, that the place where Guenther was killed was not a part of the public street, or that defendants were not guilty of any such negligence as is described in instruction No. 2 (under the law as stated therein), and further find that the agents of defendant in charge of said train exercised ordinary care in the management of said train, and did all they reasonably could, in the circumstances, to stop the train, and avoid the injury to deceased (Guenther), then you should return a verdict for defendant."

Defendant's instruction, refused: "(13) If the jury find from the evidence that the deceased, Jacob Guenther, stepped upon the western track of the defendant's railway, just before the accident, in front of a passenger-train approaching thereon from the north, and that he could have seen or heard said train if he had looked or listened, and that he went on said track without looking or listening for the same, and was struck by said train, then the verdict should be for the defendant, unless the jury further find from the evidence that said train could have been stopped by the employees of defendant in charge of said train, by the exercise of ordinary care and prudence, in time to prevent the injury, after they became aware, or might have become aware by the exercise of ordinary care, of the peril of said deceased while on said track."

The evidence fails to show that the deceased was struck at or near the crossing of any travelled public road or street, or that any such public crossing was within such a distance as to require that the bell on the engine should have been kept ringing, under the statute, as it approached the place where deceased was struck; and while the failure to ring the bell when a train is passing longitudinally along a public street, except on approaching a public crossing, and within the distance of 80 rods

Failure to ring bell. Deceased's contributory negligence. Liability notwithstanding.

thereof, is not, in the absence of any ordinance requiring it, negligence *per se*, it must be conceded, considering the long-continued and well-known situation of affairs on defendant's road-bed at the place where deceased was struck, whether that point is within the limits of the street proper or not, the exercise of reasonable care and caution required that the bell should be continually rung on the engine of a train approaching that place, at that hour, at a speed of from 15 to 20 miles an hour; and the failure of defendant's servants to so keep the bell ringing, if found to be a fact, would be an act of negligence which may have been a cause, contributing directly to Guenther's death, for the injury to plaintiff resulting from which a recovery might be had, but for the further fact that the deceased, who the evidence shows was a man of mature years, in possession of all his faculties, and who for some time had been working in a quarry alongside the track, passing the point on the track where he was struck, daily, at or about the time of day at which the accident occurred, going to his work, and who must have known that this train was due about that time, instead of walking between the two tracks, where the evidence shows there was ample space to walk with safety, even when trains were passing each other on these tracks, on a bright morning, in broad daylight, entered upon the track, the view of which was unobstructed for several hundred yards, and continued to walk on it, without looking or listening for the approaching train, or paying any attention whatever to his situation, was also guilty of such negligence, contributing directly to his death, as would prevent a recovery; and the verdict of the jury must have been for the defendant, unless it further appeared that, after the deceased had by his negligence exposed himself to peril, the defendant's servants became aware of his perilous situation, or by the exercise of ordinary care might have discovered it in time to have avoided injuring him, and thereafter, immediately before and up to the time of actual collision, failed to use the means within their power, with a proper degree of care, consistent with the safety of those on board the train, to avoid killing or injuring him (Donahoe v. Railway Co., 91 Mo. 357; s. c., 28 Am. & Eng. R. R. Cas. 673, 3 S. W. Rep. 848; Donahoe v. Railway Co., 83 Mo. 543; Bergman v. Railway Co., 88 Mo. 679; Kelley v. Railroad Co., 75 Mo. 138; Harlan v. Railway Co., 65 Mo. 22); and what would be due care, under such circumstances, would necessarily be a question for the jury under proper instructions.

The plaintiff had no case on the evidence, unless the facts brought it within this qualification of the general rule on contributory negligence, and the court properly so declared in the first instruction; and if the case had been submitted to the jury

on this instruction, in connection with the third and the defendant's refused instruction, the real and only issue in the case might be said to have been in a manner submitted to the jury; and while, in the first instruction, the jury were told, in effect, that although the deceased was guilty of such contributory negligence as would prevent a recovery, unless they found the facts to be as stated in the third instruction, they were also told, not only if they found the facts as stated in the third instruction to find for the plaintiff, but if they found them to be as stated in the second instruction to find for the plaintiff. By the use of the disjunctive conjunction in the first instruction, it is made possible to read the first and second instructions together as one instruction, or the first and third together as one instruction; but it is impossible to so read and understand the first, second, and third together as one instruction. Reading the first and second together, the jury were in effect told that, although the deceased had been guilty of negligence contributing directly to his death, yet if they found from the evidence that no bell was rung while the locomotive was passing over the street or road, immediately before the accident, and that the death of said Jacob Guenther directly resulted from the omission to sound the bell, they should find for the plaintiff. In other words, the jury were told, "Here are two acts of negligence, — one of the plaintiff in being on the track, the other of defendant in not sounding the bell, — concurring at the same time and place, the result of which is death. Now, if you find that the death resulted directly from the failure to ring the bell, you must find for the plaintiff," — practically ignoring deceased's contributory negligence, without which no death could have happened, by leaving the jury at liberty to select out the defendant's act of negligence, and say that was the direct cause of his death, and to render a verdict accordingly; and under it the jury had only to find that the bell was not being rung immediately before and at the time Guenther was struck, in a publicly travelled street, in order to find a verdict for the plaintiff, notwithstanding Guenther's act of negligence contributed directly to his death. It is not necessary to quote authorities to show that this is not the law. The death of Guenther resulting from the concurrent acts of negligence of defendant in failing to ring the bell, and of himself in being on the track, paying no heed to his situation or the approach of trains, nothing further appearing, the verdict must have been for the defendant. In order for plaintiff to recover notwithstanding deceased's negligence, a state of facts must have been shown bringing the case within the principle which the court undertook to declare in the third instruction. This reading of the second instruction receives a sort of negative emphasis from

Same. Charges to jury.

the fifth, in which the jury are in effect told that if the servants of the defendant did ring the bell, and exercised ordinary care in the management of the train, and did all they reasonably could, in the circumstances, to stop the train, and avoid the injury, then they should return a verdict for the defendant. In the light of instructions 1, 2, and 5, the jury might well conclude, that, in order to find for plaintiff, it was only necessary for them to find that the place where Guenther was struck was within the limits of the street, and that the bell was not being rung immediately before he was struck; but in order to find for the defendant, they must find that its servants had been guilty of no act of negligence whatever. This was not a fair presentation of the case to the jury. Nor was the vice of the second instruction cured in any manner by the third. They each presented a separate and independent hypothesis of facts, upon either of which the jury were instructed to find a verdict for plaintiff regardless of the other.

The evidence of the defendant tended to prove the facts hypothetically stated in defendant's refused instruction, and no good reason is perceived why it should not have been given. There would seem to be no difficulty in presenting the issue of fact to be tried in this case properly to the jury. The place where the accident occurred, and the defendant's road-bed along there, cannot, in the common acceptation of the terms, be called a public street, road, or highway; nor are there any public crossings, properly speaking, such as are contemplated in the statute requiring a bell to be rung on approaching them. Nevertheless, for many years a street has been dedicated to public use, running parallel with defendant's track. It may, and probably in some places is, within the limits of that street. However that may be, for years the space alongside the track between it and the bluff has been used by quarry teams, and at places they have been in the habit of crossing the track to get to the river; while the road-bed for years has been made use of by pedestrians, and especially by the workmen in the adjacent quarries in going to and returning from their work. In the morning, about the time this train is passing the point of the accident, large numbers of them are to be found passing over this ground to their work. The track is straight, clear, and unobstructed, and a person on it in plain view to an approaching train from the north for several hundred yards. The servants of the defendant on this train, approaching this point, at this hour, at the rate of speed testified to, while such rate of speed is not unlawful, and while it may not have been their duty absolutely, under the law, to keep the bell ringing, ought to have been at their posts on the alert

watching the track before them, and if the deceased was seen to be walking on the track, apparently unconscious of their approach, to give the alarm by both bell and whistle, and, if these were unheeded, to stop the train, if need be, in time, if possible, with safety to those on board, to prevent running over and killing him; and if his death by these means could have been avoided, and they were not used, the defendant is liable, although the deceased may have been guilty of negligence in entering and walking upon defendant's track, which contributed to his death; and the defendant is alike liable if its servants did not, but, by the exercise of such caution and care as the exigencies of the situation demanded of an ordinarily prudent man, could have discovered the perilous situation of the deceased, and could have made use of the means that would have prevented the injury after such discovery. The theory of the plaintiff, on the evidence, was, that the deceased was and could have been seen on the track by the defendant's engineer and fireman, if they had been at their posts, on the watch, several hundred yards before the engine reached the place where he was struck; that they had plenty of time to give the alarm, observe its effect on the deceased, and, if it failed to alarm him, afterwards to have stopped the train before it reached him, and thus have prevented the tragedy, all of which they failed to do. The theory of the defendant was, that the deceased stepped upon the track a short distance in front of the engine, was immediately discovered in his perilous situation, and every effort made to stop the train before it struck him, but that the train could not be stopped in time. That was the only issue on the evidence that should have been presented to the jury, and to which, if sharply presented, they could have responded intelligently.

For the error in giving the second instruction, and in refusing defendant's instruction No. 13, without discussing the other instructions, the judgment will be reversed, and the cause remanded for new trial.

All concur.

Trespassers on Railway Track. — It is generally held that a railway track is private property at all places except established crossings and public highways, and that all persons, except agents and servants of the company in the discharge of their duty, who go upon the track are trespassers (see *Galveston, H. & S. A. R. Co. v. Ryon*, *ante*, p. 30); and particularly is this so where they use the track as a foot-path or thoroughfare on which to walk or travel. See *Kansas Pac. R. Co. v. Ward*, 4 Colo. 30; *Patterson v. Philadelphia, W. & B. R. Co.*, 4 *Houst. (Del.)* 103; *s. c.*, 7 *Am. Ry. Rep.* 207; *Illinois Cent. R. Co. v. Hetherington*, 83 *Ill.* 510; *Sweeney v. Boston & A. R. Co.*, 128 *Mass.* 5; *s. c.*, 1 *Am. & Eng. R. R. Cas.* 138; *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 *Mass.* 277; *s. c.*, 12 *Am. Rep.* 689; *Hazen v. Boston & M. R. Co.*, 68 *Mass. (2 Gray)* 574, 580; *Isabel v. Hannibal & St. J.*

- R. Co., 60 Mo. 475; s. c., 9 Am. Ry. Rep. 261; *McCarty v. Delaware & Hudson Canal Co.*, 17 Hun (N. Y.), 74; *Pittsburgh, F. W. & C. R. Co. v. Collins*, 87 Pa. St. 405; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. C. C. 579. And a person so intruding upon the track cannot recover on proof of ordinary negligence merely, but must show that he himself used extraordinary care, and was wantonly or wilfully injured by the company or its employees. See *Railway Co. v. Monday* (Ark.), 4 S. W. Rep. 782; *Railroad Co. v. Smith* (Ga.), 3 S. E. Rep. 397; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; s. c., 22 Am. Rep. 112. See also *Kennedy v. Railroad Co.* (Colo.), 16 Pac. Rep. 210; *Patterson v. Philadelphia, W. & B. R. Co.*, 4 Houst. (Del.) 103; s. c., 7 Am. Ry. Rep. 207; *May v. Banking Co.* (Ga.), 4 S. E. Rep. 330; *Warren v. Chicago, R. I. & P. R. Co.*, 68 Iowa, 602; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Nichols's Admr. v. Louisville & N. R. Co.*, *ante*, 37; *Railroad Co. v. Colman's Admr.* (Ky.), 6 S. W. Rep. 438; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Johnson v. Boston & M. R. Co.*, 125 Mass. 75; *Baumeester v. Railroad Co.* (Mich.), 34 N. W. Rep. 414; *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 293; *Scheffler v. Railroad Co.*, 32 Minn. 125; *Strong v. Railroad Co.* (Miss.), 3 South. Rep. 465; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; s. c., 9 Am. Ry. Rep. 261; *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129; s. c., 21 Am. Rep. 597; 3 Hun (N. Y.), 329; 5 T. & C. (N. Y.) 475; *McCarty v. Delaware & Hudson Canal Co.*, 17 Hun (N. Y.), 74; *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. C. C. 579.

Deaf Mutes, Infants, Etc.—An exception, however, is made in those cases where the trespasser is a deaf person (see *Laicher v. New Orleans, J. & G. N. R. Co.*, 28 La. An. 320; *Cogswell v. Oregon & Cal. R. Co.*, 6 Oreg. 417), or an infant who is supposed not to have the faculties requisite for the apprehension of danger, or at least incapable of exercising such faculties with adults, and the railroad company is required to exercise a higher degree of care and caution than in respect to adults. See *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513; s. c., 38 Am. Rep. 67; *Schierhold v. Northern Beach & M. R. Co.*, 40 Cal. 447; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; s. c., 42 Am. Rep. 418; *Isabel v. Hannibal & St. J. Co.*, 60 Mo. 475; s. c., 9 Am. Ry. Rep. 261; *Telfer v. Northern R. R. Co.*, 30 N. J. L. (1 Vr.) 188; *Eastern T. & G. R. Co. v. St. John*, 5 Sneed (Tenn.) 524; *Evansich v. Gulf, C. & S. F. R. Co.*, 57 Tex. 126; s. c., 44 Am. Rep. 586.

Ring the Bell and sounding the Whistle.—While it is not the duty of the agents and servants of the railway company, on discovering a trespasser on the track, to ring the bell and sound the whistle (see *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 476), yet it would seem, that, as a matter of ordinary prudence and care, they should sound the whistle and ring the bell, warning the trespasser of the approaching danger. *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. C. C. 579. But see *Harlan v. St. Louis, K. & N. R. Co.*, 64 Mo. 480; s. c., 17 Am. Ry. Rep. 300.

In Tennessee, and perhaps in some other States, this matter is regulated by statute. In such States railway companies are required to sound the whistle and to use every possible means to stop the train and prevent an accident; and on failure to make such effort, are absolutely liable. See *Hill v. Louisville & N. R. Co.*, 9 Heisk. (Tenn.) 823; s. c., 19 Am. Ry. Rep. 400; *Louisville & N. R. Co. v. Robertson*, 9 Heisk. (Tenn.) 276; s. c., 20 Am. Ry. Rep. 9; *Louisville & N. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19; s. c., 19 Am. Rep. 368.

The reason for this rule would seem to be, that, although the person injured was guilty of negligence in going upon the track, his negligence does not exonerate the railroad company from the use of ordinary and proper care. See *Kansas Pac. R. Co. v. Cranmer*, 4 Colo. 524; *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499; *Pittsburgh, F. W. & C. R. Co. v. Bumstead*, 48 Ill. 221;

Baltimore & O. R. Co. *v.* State, 36 Md. 366; Isabel *v.* Hannibal & St. J. R. Co., 60 Mo. 475; s. c., 9 Am. Ry. Rep. 261; Sioux City & Pac. R. Co. *v.* Stout, 85 U. S. (17 Wall.) 657, bk. 21, L. ed. 745. Particularly is this so in the outskirts of public cities, where built on the line of the railway track, and persons are in the habit of using such track as a thoroughfare. See Pennsylvania R. Co. *v.* Lewis, 79 Pa. St. 33. Thus, it has been held that an engineer is bound to stop, or at least check, his train, on discovering a trespasser who is not apprised of his danger, or, if apprised, is unable to leave the track. Cook *v.* Central R. & B. Co., 67 Ala. 533.

It would seem, however, that under ordinary circumstances there is no obligation resting upon the company to stop or check up their train in approaching a person thus trespassing. See Maher *v.* Atlantic & Pac. R. Co., 64 Mo. 267; s. c., 17 Am. Ry. Rep. 231; Philadelphia & R. R. Co. *v.* Hummell, 44 Pa. St. 375; Finlayson *v.* Chicago, B. & Q. R. Co., 1 Dill. C. C. 579. Because, as it has been said, the law presumes that a person walking upon a railway track will leave the same in time to prevent injury from an approaching train of which he has knowledge, or should have by the ordinary use of the sense of hearing and seeing, and that the managers of the train may act upon this presumption. See Indianapolis & V. R. Co. *v.* McClaren, 62 Ind. 566; Lake Shore & M. S. R. Co. *v.* Miller, 25 Mich. 279; Houston & T. Cent. R. Co. *v.* Smith, 52 Tex. 178. See also Gonzales *v.* New York & H. R. Co., 50 How. (N. Y.) Pr. 126; Green *v.* Erie R. Co., 11 Hun (N. Y.), 333; Ellwood *v.* New York C. & H. R. R. Co., 4 Hun (N. Y.), 808; Tanner *v.* Louisville & N. R. Co., 60 Ala. 621; Mobile & M. R. Co. *v.* Blakeley, 59 Ala. 471; Teunenbrock *v.* South Pac. R. Co., 59 Cal. 269; Austin *v.* Chicago, R. I. & P. R. Co., 91 Ill. 35; Illinois Cent. R. Co. *v.* Hetherington, 83 Ill. 510; Chicago, B. & Q. R. Co. *v.* Damerell, 81 Ill. 450; Toledo, W. & W. R. Co. *v.* Jones, 76 Ill. 311; Illinois Cent. R. Co. *v.* Hall, 72 Ill. 222; Lake Shore & M. S. R. Co. *v.* Hart, 87 Ill. 529; Indianapolis & V. R. Co. *v.* McClaren, 62 Ind. 566; Murphy *v.* Chicago, R. I. & P. R. Co., 45 Iowa, 661; Carlin *v.* Chicago, R. I. & P. R. Co., 37 Iowa, 316; Mason *v.* Missouri Pac. R. Co., 27 Kans. 83; s. c., 41 Am. Rep. 405; State *v.* Baltimore & P. R. Co., 58 Md. 482; Laicher *v.* New Orleans, J. & G. N. R. Co., 28 La. An. 320; Bancroft *v.* Boston & W. R. Co., 93 Mass. (11 Allen) 34; s. c., 97 Mass. 275; Smith *v.* Minneapolis & St. L. R. Co., 26 Minn. 419; Donaldson *v.* Milwaukee & St. P. R. Co., 21 Minn. 293; Carroll *v.* Minnesota Val. R. Co., 13 Minn. 30; Lenix *v.* Missouri Pac. R. Co., 76 Mo. 86; Poole *v.* North Carolina R. Co., 8 Jones (N. C.), L. 340; Meek *v.* Pennsylvania R. Co., 38 Ohio St. 632; Cogswell *v.* Oregon & C. Co., 6 Oreg. 417; Moore *v.* Pennsylvania R. Co., 99 Pa. St. 301; s. c., 44 Am. Rep. 106; Hoover *v.* Texas & P. R. Co., 61 Tex. 503; Rothe *v.* Milwaukee & St. P. R. Co., 21 Wis. 256; Finlayson *v.* Chicago, B. & Q. R. Co., 1 Dill. C. C. 579.

Thus it has been held, that where one without authority enters upon a railway track, and while there becomes insensible from providential causes, and while in this state, and in plain view, was run over by a train, the company will be held liable for the negligence of its servants to keep a good lookout. Houston & T. C. R. Co. *v.* Sympkins, 54 Tex. 615; s. c., 38 Am. Rep. 632. See Meeks *v.* Southern Pac. R. Co., 56 Cal. 513; s. c., 38 Am. Rep. 67; Chicago & A. R. Co. *v.* Kellam, 92 Ill. 245; s. c., 34 Am. Rep. 128; Kansas Cent. R. Co. *v.* Fitzsimmons, 22 Kans. 686; s. c., 31 Am. Rep. 203; Denman *v.* St. P. & D. R. Co., 26 Minn. 357; Richmond & D. R. Co. *v.* Anderson's Admr., 31 Gratt. (Va.) 812; s. c., 31 Am. Rep. 750. But it seems that it would be otherwise if the trespasser's insensibility was caused by reason of his voluntary intoxication. Houston & T. C. R. Co. *v.* Sympkins, 54 Tex. 615; s. c., 38 Am. Rep. 632. Yet it has been held, that, where a persons lays down upon a railroad track in a hopeless state of intoxication, the company will not be justified in running a train over him if it can be avoided in the

exercise of reasonable care, if the person is discovered in his exposed condition. *Weymire v. Wolfe*, 52 Iowa, 533.

Failure to Look and Listen.— It has been held that one who without right, and with full knowledge of the location, voluntarily goes upon a railroad track where there is no crossing, and which is a known place of danger, is guilty of negligence *per se* (*Pittsburgh, F. W. & C. R. Co. v. Collins*, 87 Pa. St. 405), and that one who deliberately walks upon a railroad track, whether laid in a public highway, in a street, in an open field, or elsewhere, is presumed to assume the risk of any peril he may encounter (*Illinois Cent. R. Co. v. Hall*, 72 Ill. 222. See *Kansas Pac. R. Co. v. Pointer*, 9 Kans. 620), and is bound to look and listen, and make due use of all his faculties for the discovery of approaching trains, and to avoid danger. *Laverenz v. Chicago, R. I. & P. R. Co.*, 56 Iowa, 689; *Lang v. Holiday, C. R. & C. M. Co.*, 49 Iowa, 469; *Benton v. Iowa Cent. R. Co.*, 42 Iowa, 192; *Carlin v. Chicago, R. I. & P. R. Co.*, 37 Iowa, 316; *Artzv v. Chicago, R. I. & P. R. Co.*, 34 Iowa, 153.

Pennsylvania Doctrine.— In Pennsylvania, and some other States, it is held that railways are entitled to a clear track (*Little Schuylkill N. R. & C. Co. v. Norton*, 24 Pa. St. 465; s. c., 64 Am. Dec. 672. Compare *Lake Shore & M. S. R. Co. v. Hart*, 87 Ill. 529; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478), and that railroads need not take precaution for the safety of trespassers, because, as the court say in *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 366, "except at crossings, where the public have a right of way, a man who steps his foot upon a railway track does so at his peril." *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. St. 258; s. c., 47 Am. Rep. 706; *Pittsburgh, F. W. & C. R. Co. v. Collins*, 87 Pa. St. 405; s. c., 30 Am. Rep. 371; *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 366; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. St. 300; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Reeves v. Delaware, L. & W. R. Co.*, 30 Pa. St. 454; s. c., 72 Am. Dec. 713; *Little Schuylkill N. R. & C. Co. v. Norton*, 24 Pa. St. 465; *McClandlish v. Newman*, 22 Pa. St. 465; *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298.

In those States where this rule prevails, railroad companies will only be held liable for any cases of wanton injury, and of such gross and aggravated negligence as amounts to intentional mischief. See *Teunenbrock v. South. Pac. C. R. Co.*, 59 Cal. 269; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; s. c., 22 Am. Rep. 112; *Terre Haute & Ind. R. Co. v. Graham*, 95 Ind. 286; s. c., 48 Am. Rep. 719; *Cincinnati & M. R. Co. v. Eaton*, 53 Ind. 310; *Ream v. Pittsburgh, F. W. & C. R. Co.*, 49 Ind. 93; *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind. 43; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Indiana Cent. R. Co. v. Hudelson*, 13 Ind. 325; *Mason v. Missouri Pac. R. Co.*, 27 Kans. 83; s. c., 41 Am. Rep. 405; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; s. c., 30 Am. Rep. 686; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208; *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 293; *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30; *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Green v. Erie R. Co.*, 11 Hun (N. Y.), 333; *Kenyon v. New York Cent. & H. R. R. Co.*, 5 Hun (N. Y.), 479; *Herring v. Wilmington & R. R. Co.*, 10 Ired. (N. C.) L. 402; s. c., 51 Am. Dec. 395; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. (5 Otto) 697, bk. 24, L. ed. 542.

Rule under Kentucky and Tennessee Statutes.— It would seem that under the Kentucky statute (Gen. Stats. of Ky. 1883, chap. 57, sect. 3; 2 Stanton's Ky. Rev. Stat. 500, sect. 3) and the Tennessee statute (Thom. & Steg. Tenn. Stats. sect. 166, subsect. 5, sect. 1168) that the courts have gone to the opposite extreme from the Pennsylvania and similar decisions, and hold railroad companies responsible for injury to trespassers on slight evidence of negligence, there being a tendency to construe as "wilful" many acts and omissions which in other jurisdictions would not be so severely regarded. *Louisville & N. R. Co. v. Brooks's Admx.*, 83 Ky. 109; *Kentucky Cent. R. Co. v. Gastineau's Admr.*, 83 Ky. 119; *Jones's Admr. v. Louisville & N. R.*

Co., 82 Ky. 610; *Claxton v. Lexington & B. S. R. Co.*, 13 Bush (Ky.), 636; *Lexington v. Lewis's Admr.*, 10 Bush (Ky.), 677; *Board of Internal Improvements v. Searce*, 2 Duv. (Ky.) 576; *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114; *Smith v. Nashville & C. R. Co.*, 6 Coldw. (Tenn.) 589; *Louisville & N. R. Co. v. Burke*, 6 Coldw. (Tenn.) 45; *Railroad v. Walker*, 11 Heisk. (Tenn.) 383; *Hill v. Louisville & N. R. Co.*, 9 Heisk. (Tenn.) 823; *Louisville & N. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19; *Eastern T. & G. R. Co. v. St. John*, 5 Sneed (Tenn.) 524.

See generally as to **Duty of Company to Trespassers on track**, note, 2 Am. & Eng. R. R. Cas. 124; *Moore v. Pennsylvania R. Co.*, 6 Ib. 569, note 572; *Louisville, etc., R. Co. v. Cooper*, 6 Am. & Eng. R. R. Cas. 5; *Teunenbrock v. Southern Pac. R. Co.*, 6 Ib. 8; *Houston, etc., R. Co. v. Sympkins*, 6 Ib. 11, note 17; *Northern Cent. R. Co. v. State*, 6 Ib. 66; *Frick v. St. Louis, etc., R. Co.*, 8 Ib. 280; *Meeks v. Southern Pac. R. Co.*, 8 Ib. 314; *Colorado Central R. Co. v. Holmes*, 8 Ib. 410; *Parker v. Wilmington, etc., R. Co.*, 8 Ib. 420; *International & G. N. R. Co. v. Jordan*, 10 Ib. 301; *Yarnell v. St. Louis, etc., R. Co.*, 10 Ib. 726; *Paducah, etc., R. Co. v. Letcher*, 12 Ib. 61; *Baltimore, etc., R. Co. v. Depew*, 12 Ib. 64; *Terre Haute, etc., R. Co. v. Graham*, 12 Ib. 77; *Louisville, etc., R. Co. v. Watkins*, 12 Ib. 89; note, 14 Ib. 662; note, 13 Ib. 626; *McGeary v. Eastern R. Co.*, 15 Ib. 407; *Bacon v. Baltimore, etc., R. Co.*, 15 Ib. 409, note 414; *Carter v. Columbia, etc., R. Co.*, 15 Ib. 414; *Davis v. Chicago, etc., R. Co.*, 15 Ib. 424, note 438; *Nashville, etc., R. Co. v. Smith*, 15 Ib. 469; *East Tennessee, etc., R. Co. v. Humphreys*, 15 Ib. 472, note 477-478; *Dinwiddie v. Louisville, etc., R. Co.*, 15 Ib. 483; *McClelland v. Louisville, etc., R. Co.*, 18 Ib. 268; *International, etc., R. Co. v. Smith*, 19 Ib. 21, note 24; *Burnett v. Burlington, etc., R. Co.*, 19 Ib. 25, note 41; *Central R. Co. v. Brinson*, 19 Ib. 42; *Baltimore, etc., R. Co. v. State*, 19 Ib. 283; *Keyser v. Chicago, etc., R. Co.*, 19 Ib. 91; *Louisville, etc., R. Co. v. Green*, 19 Ib. 95, note 97; *Louisville, etc., R. Co. v. Howard*, 19 Ib. 98, note 102; *East Tennessee, etc., R. Co. v. Fain*, 19 Ib. 102; *McAllister v. Burlington, etc., R. Co.*, 19 Ib. 108, note 111; *Schmittelhelm v. Louisville, etc., R. Co.*, 19 Ib. 111; *Scheffler v. Minneapolis, etc., R. Co.*, 19 Ib. 173; note, 19 Ib. 326; *Grethen v. Chicago, etc., R. Co.*, 19 Ib. 342; *Rudd v. Richmond & D. R. Co.*, 23 Ib. 253; *Chicago & Eastern Ill. R. Co. v. Hedges*, 25 Ib. 550; *Rine v. Chicago & A. R. Co.*, 25 Ib. 545; *Wright v. Railroad Co.*, 28 Ib. 652; *Achackelford v. Louisville, etc., R. Co.*, and note, 28 Ib. 591-594; *Louisville, etc., R. Co. v. Ginestra*, 29 Ib. 297; *Palmer v. Chicago, etc., R. Co.*, 31 Ib. 364, note 373; *Baumeister v. Grand Rapids & I. R. Co.*, 31 Ib. 376; *East Tennessee, etc., R. Co. v. King*, 31 Ib. 385; *Louisville, etc., R. Co. v. Colman*, 31 Ib. 390; *Alabama, etc., R. Co. v. Chapman*, 31 Ib. 394; *Keyser v. Chicago & G. T. R. Co.*, 31 Ib. 399; *Chrystal v. Troy & B. R. Co.*, 31 Ib. 411, note 415; *St. Louis, etc., R. Co. v. Monday*, 31 Ib. 424; *Gregory v. Cleveland, etc., R. Co.*, 31 Ib. 440; *Mobile & O. R. Co. v. Stroud*, 31 Ib. 443, note 447.

SCHILLING

v.

CHICAGO, MILWAUKEE, & ST. PAUL R. CO.

(*Wisconsin Supreme Court, March 27, 1888.*)

Trespasser on Track: — Contributory Negligence — Failure to Look and Listen.— In an action by an administrator to recover for the death of his intestate, it appeared that deceased was walking on a path by the side of the railroad track; that he knew that the train by which he was killed was due at that place about that time, and therefore had reason to expect and look out for it; that he did not look and listen; that he might have seen along track for a distance of forty rods; that, when the train came within forty feet of him, deceased attempted to cross the track, and was run over and killed. *Held*, that the failure of deceased to look and listen was the proximate cause of his death, and that a nonsuit was properly granted, even though the engineer might have been negligent in some measure in failing to ring the bell. Taylor, J., dissenting.

APPEAL from Dodge County Circuit Court.

Action by Catherine Schilling, as administratrix of Casper Schilling, against the Chicago, Milwaukee, & St. Paul Railway Company, for damages for negligently killing her intestate. Plaintiff appeals from a nonsuit.

The opinion states the facts.

Harlow Pease for appellant.

John W. Cary (*Burton Hanson* of counsel) for respondent.

ORTON, J. — The undisputed facts of this case seem to be as follows: A very long and heavily loaded freight-train of the company, being hauled by a very large and heavy engine, **Facts.** was going from the junction at Watertown north-westerly, a short time before one o'clock in the afternoon, somewhat behind the time of half-past twelve o'clock, the regular time of its passing at that place, and where and when it had passed, about on time, for about eleven years before. The wind was blowing strongly from the north-west, the direction in which the train was moving. From the place where the accident occurred, and south-eastwardly towards the junction, the track was open and straight for nearly half a mile; and the train could have been easily seen that distance by any one at the place of the accident, and any one on or near the track at such place could have been easily seen by the engineer on the train for that distance. When the train was about 40 rods behind him, the deceased was walking

¹ TRESPASSER ON TRACK. — See *ante*, *Kennedy v. Denver, S. P. & Pac. R. Co.*, 40, and note 47; *Guenther v. St. Louis, I. M. & S. R. Co.*, 47, and note 55.

on a pathway about three feet on the south side of the railroad track, and towards the north-west, and was so seen by the engineer. When the train came within about 40 feet of him, the deceased attempted to cross over the track, apparently for the purpose of going towards his house, about 200 feet north or north-west of the track at that point, and where he had lived for a great many years. The attention of the engineer had been diverted by some duty to be performed in a place on the engine from which he could not look ahead on the track, until the train had come within said 40 feet of the deceased, just as he attempted to so cross the track in front of the engine. Whether at that time signals were given by whistle or bell, or both, is a question in dispute, as also whether the usual signals had been given in crossing the streets of Watertown in the vicinity, and before arriving at that point. An attempt was made to stop the train before it reached the deceased; but it was too near him to be successful, and the train was stopped only after the locomotive had passed over and beyond him about 80 feet. The rate of speed the train was going at the time was also a question in dispute. The Circuit Court, on these facts, granted a nonsuit in the case. The negligence of the company, if any, consisted in either the signals not having been given, or the train having been run with greater speed than six miles an hour; and both of these questions, depending upon a conflict of evidence, were proper to be determined by the jury, and not by the court. We presume, therefore, that the only ground upon which the nonsuit was granted was the contributory negligence of the deceased. The deceased knew that this freight-train was due at that place about that time, and therefore had reason to expect and look out for it. It is quite evident that he did not look to see whether this train was coming towards him in all that distance of at least 40 rods, or he would have kept it within observation up to the time of his attempt to cross over the track; and that he did not look towards the train within that last 40 feet, or he would have stopped, or jumped from the track instantly to save his life. The conclusion is inevitable, therefore, that the deceased did not look and did not listen. He used neither his eyes nor his ears in this place of great danger. The train made a great noise, and, as the engineer testified, as much as the whistle or bell could make. The strong head-wind may have prevented the sound of either coming to the deceased. But he was aware of this disadvantage, as well as of the fact that the train was due, and might be expected at any moment. Was he guilty of a want of ordinary care and prudence in thus attempting to cross over the track without hesitating to listen or look in the

Deceased's
contributory
negligence in
failing to look
or listen.

direction from which he had reason to expect the approaching train? Can we say that an ordinarily prudent man, with the same knowledge of the time when the train was due, and having lived so near the railroad at that place so long a time, would not have looked or listened before crossing the track? He took no precaution, and used no means whatever, to avoid the danger. He used no care and exercised no prudence whatever. He might as well have been blind and deaf. Did not his own want of common care and ordinary prudence contribute to the injury that resulted in his death? It seems to us that this is one of the clearest cases for the application of the rule that it was his duty to have looked or listened before he attempted to cross over the track, a place of so much risk and danger. If he had looked back at any time within the distance of that 40 rods, and especially before he turned to cross over the track, he would have saved himself from death. The cases in this court touching this question are sufficiently numerous and to the point, without at this time concerning ourselves about cases elsewhere. The last case in which this duty to "look or listen" has been considered, and which is cited by the learned counsel of the appellant with the positive assurance that it is authority in point against this nonsuit, is that of *Hoye v. Railway Co.*, 67 Wis. 1. In that case the circumstances are very peculiar, and quite different from those of this case in most all respects. It is sufficient to cite the language of Mr. Justice Cassoday, in the opinion in that case, to show its entire inapplicability to this. He said, "Undoubtedly she was bound to use her eyes in looking, and her ears in hearing, and to act prudently upon the knowledge thus acquired. . . . This being the fixed rule of law, it cannot be conclusively presumed that Mrs. Hoye did not, at the time and place in question, look and listen, and prudently act upon the knowledge thus acquired." In this case, it can be conclusively presumed that the deceased did not look or listen; for, if he had done so, he would most certainly have avoided the danger. There can be no other possible conclusion. It will be noticed, that in that case the rule is restated and re-affirmed, that a person placed in such circumstances must use his eyes to look and see, or his ears to listen and hear, the approaching train, or be guilty of such a want of care and prudence, and of such contributory negligence, as to preclude a recovery. *Delaney v. Railway Co.*, 33 Wis. 70; *Kearney v. Railway Co.*, 47 Wis. 144; and *Williams v. Railway Co.*, 64 Wis. 1; s. c., 23 Am. & Eng. R. R. Cas. 274, are closely in point. In this last case, the counsel of the respondent has collated numerous decisions in this and other States affirming this rule. See also *Rothe v. Railway Co.*, 21 Wis. 256; *Langhoff v. Railway Co.*, 23 Wis. 43; *Haas v. Railway Co.*,

41 Wis. 44. If we should hold that the deceased was not guilty of contributory negligence in this case, it would virtually overrule all of the above cases. We think that the Circuit Court did not err in granting a nonsuit in the case. The judgment of the Circuit Court is affirmed.

Taylor, J., dissents.

HOUSTON & TEXAS CENTRAL R. CO.

v.

BOOZER.

(*Texas Supreme Court, April 28, 1888.*)

Action for Personal Injuries — Damages — Infant — Instructions. — In an action by an infant to recover damages for personal injuries, an instruction by the court that the plaintiff, who was a minor, and living with his mother, would be entitled to recover for his diminished capacity, if any, to labor and earn a livelihood, although excepted to, will not be ground for reversal where there is no complaint that the verdict of the jury was excessive.

Same — Persons crossing Track — Lookout — Conflict of Evidence. — Where there is evidence tending to show that no lookout was kept upon the train, though upon this point there is a conflict of evidence, and it is not claimed that there was any warning given of the approach of the train other than such as would result from its movement, the question whether the plaintiff, a minor, used due care in crossing the defendant's track, or whether the accident was caused by the defendant's negligence, is properly left to the jury.

APPEAL from Grayson County District Court.

Action by John H. Boozer, a minor, by his next friend, against the Houston & Texas Central Railway Company, to recover damages for injuries sustained by plaintiff, through defendant's negligence. Judgment for plaintiff, from which defendant appeals.

The opinion states the case.

R. De Armoud for appellant.

W. W. Wilkins and *Woods & Cunningham* for appellee.

STAYTON, C. J. — This action was brought by appellee, through his next friend, to recover damages for an injury alleged to have been caused by the negligence of the employees of the appellant. At the time of the injury the appellee was a child in his tenth year, and he was injured while attempting to cross the railway track. The first assignment of error is as follows: "The court erred in the fifth paragraph of its charge to the jury, wherein it is stated by the court to the jury, that, in estimating the amount of damages

Instruction
as to measure
of damages.

that plaintiff might recover, the jury might consider plaintiff's diminished capacity, if any, to labor and earn a livelihood, for the following reason: the plaintiff is a minor. The evidence shows that he was living with his mother at the time of the injury, and still is. She is therefore entitled to his earnings during minority; that his father is dead, and that his mother has now a suit pending against defendant for damages occasioned plaintiff from the same accident." The part of the charge complained of, considered with relation to an adult seeking to recover for an injury to himself, would be strictly correct; but in the case in which it was given, the court should have limited the liability for damages resulting from diminished capacity to labor, caused by the injury, to the period after the appellee's majority; for, until that period was reached, the appellee would not be entitled to the proceeds of his own labor, and would not be entitled to damages on account of his diminished capacity. We are of the opinion, however, that we would not be authorized to reverse the judgment on account of this charge, even if it was not the duty of the appellant to have asked a proper charge in this respect, for there is no complaint made that the verdict of the jury was excessive. The only effect the charge could have had would have been to cause an excessive verdict, and it in no way had a bearing on the question whether the appellant was liable at all under the facts.

The controversy in the lower court, and here, is as to whether, under the facts, the appellant is liable at all. The appellee was injured while attempting to cross the track at a path leading from the thickly populated part of the city of Denison to houses on the opposite side of the railway, which seems to have been frequently used by many people for a considerable period without objection. In such a case, as said by the Supreme Court of Pennsylvania, "if an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights, in view of the circumstances, so as to not mislead others to their injury without a proper warning of his intention to recall the permission." Whether, in view of the facts attending the use of the path, the railway company used that care which it ought to have used to guard persons from injury, was a question for the jury, and there was evidence tending to show that no lookout ahead of the train was exercised, though upon this point there was a conflict of evidence; but that there was any warning given of the approach of the train other than such as would result from its movement, is not claimed. Although

Injury to
person cross-
ing track.
Conflict of
evidence.

it might not be the statutory duty of a railway company, at such a place, to give the signals of an approaching train, as is required at a public crossing, yet the failure to do so might be negligence. The engineer stated that he was looking ahead, and that he did not see the boy at all ; but from the other evidence in the case the jury may have come to the conclusion that his statement was not true. The degree of care that should be used must be proportioned to the nature of the act performed, the place where performed, and the extent of danger and injury likely to result from a failure to use due prudence and care in avoidance of injury to others. We cannot say, under the evidence in this case, that the employees of the appellant used that care which the law requires.

This cause was before this court at a former term, when a judgment in favor of the appellee was set aside, on the ground that it appeared from the evidence that the injury resulted from the contributory negligence of the appellee. Another jury has passed on the case, under evidence tending to relieve the appellee from the charge of contributory negligence, which was not before the jury on the former trial. As the case now stands, were the appellee an adult, it seems to us the verdict should be set aside ; but we cannot say that the same degree of care should be exacted of a boy of the appellee's age as must be of an adult. Whether he used that care in attempting to cross the track, and in ascertaining the danger that attended his act, incumbent on one of his age, was a question submitted to the jury by a charge which, on this point, and all others bearing on the question of the liability of the appellant at all, was as favorable to the appellant, and as exacting on the appellee, as the facts would have warranted. Two juries have passed upon the facts ; twice have judges of the District Court refused to grant new trials. The appellee was of tender years ; there was evidence from which the jury might find the employees of the appellant did not use that care which, under the circumstances, should have been used ; and the jury were in position to determine whether the acts of the appellee were, in one of his age, the exercise of such care as such a person should exercise. The rules by which this court is necessarily governed in setting aside verdicts on the ground that they are contrary to the evidence, have been too often announced now to require repetition. We cannot see our way clear to the granting of such relief in this case, and the judgment must be affirmed. It is so ordered.

HUGHES

v.

GALVESTON, HOUSTON, & SAN ANTONIO R. CO.

(67 Texas, 595.)

Trespasser on Track¹ — **Intoxication** — **Evidence** — **Prejudice**. — In an action by a widow to recover damages for the death of her husband, who had been killed on defendant's track, plaintiff was asked whether, when informed of the injury, she did not say that "he always went on the track when drunk." An objection to the question was overruled, and plaintiff stated she made no such remark. *Held*, that, in the absence of objection to testimony tending to show that she did make the remark, the overruling of the objection to the question was a harmless error.

Same — **Headlight** — **Ringling Bell** — **Evidence** — **Competency**. — In such action, several witnesses who were present when the accident occurred, stated that the bell on the locomotive which killed plaintiff's husband was ringing for some distance prior to reaching the point where deceased was first seen, and so continued, and that the headlight was burning. *Held*, that, in this state of the evidence, the testimony of a witness who lived at some distance from the place of the accident (but how far, not shown), that the bell was not ringing, or the headlight burning, when the locomotive passed his house, was properly excluded.

Same — **Contributory Negligence**. — If a person fully capable, mentally and physically, to take care of himself, enters upon and remains on a railroad track until he is injured by an approaching train or locomotive, which he might have seen and heard by the use of his senses, the contributory negligence of such person will defeat a recovery.

APPEAL from District Court, Bexar County.

Action to recover damages for the negligent killing of plaintiff's husband. Verdict and judgment for defendant. Plaintiff appeals.

The opinion states the case.

Teel & Haltom for appellants.

Waelder & Upson for appellee.

STAYTON, J. — This action was brought by the widow of Michael Hughes, in her own right, and for the benefit of the minor children of herself and her deceased husband. She seeks to recover damages for an injury which she alleges was caused by the negligence of the railway company and its servants, that resulted in the death of her husband. It is now

¹ TRESPASSER ON TRACK. See *ante*, *Kennedy v. Denver, S. P. & Pac. R. Co.*, 40, and note 47; *Guenther v. St. Louis, I. M. & S. R. Co.*, 47, and note 55.

urged, as a ground for reversal, that there was such evidence as required a verdict for the plaintiff, and denied one to the defendant. The assignments of error relate to the admission and exclusion of evidence, and to the giving and refusing to give instructions to the jury.

The uncontroverted evidence shows that the deceased was first seen sitting on the railway track about 50 feet in advance of the locomotive which came in contact with him, and that, so soon as seen, effort was made to avoid the collision; but there is some evidence to the effect that a locomotive could be stopped in a less distance than that intervening between the deceased and the locomotive when he was first seen. The appellant, on cross-examination, was asked whether, when informed of the injury to her husband, she did not say that "he always went to the track when drunk." This question was **Admission of remark as to intoxication.** objected to, and the objection overruled; and the witness then stated that she made no such remark. If this question was an improper one, the answer to it certainly could not have had any injurious effect upon the case. If this question was irrelevant, and asked for the purpose of laying a predicate to impeach the evidence of the witness, by proving that she made such a remark, the latter evidence might have been excluded; but there is no assignment of error presented in the brief of counsel which raises the question of admissibility of evidence to show that she did make the remark. Such an assignment is found in the record; but, as it is not presented in brief of counsel, it must be deemed to be waived. Rule 29.

Several witnesses who were present when the accident occurred, stated that the bell on the locomotive was ringing for some distance prior to reaching the point at which the deceased was first seen, and so continued, and that the headlight was burning; but one witness **Evidence as to signals and headlight.** stated that the headlight was not in good order. Thus standing the evidence, a witness who lived west of the place of accident, how far not shown, proposed to testify that the bell was not ringing, or the headlight burning, when the locomotive passed her house; and this evidence was excluded. No injury could have resulted from the exclusion of this evidence, which, it seems to us, ought not to have been admitted, even if in some cases proof of the condition of a locomotive near to, but not at, the place and exact time of an accident, might be admissible.

The fourth assignment of error is, that "the court erred in giving the special charges asked by defendant." Two charges, relating to different matters, were given at request of defendant; and the assignment does not point out, as required by the statute

and rules of this court, the specific error relied on. The statute, as well as the rules of this court, declare that such assignment shall not be considered. Rev. St. art. 1037, rule 26.

The fifth assignment is, that "the court erred in refusing to give the special charges asked by plaintiff." The charges so

Charges properly refused. asked consisted of five distinct paragraphs, relating to as many different matters, and, for the reasons before stated, is not such an assignment as is required; in view of which case we deem it proper to say that we have looked to the charges given at request, and refused, to ascertain whether there was any such error in either of these respects as we could or ought to notice, in the absence of any assignment, and we find none such. Under the case made by the evidence, the charges asked and given were substantially correct; while those asked and refused were in part erroneous and not applicable to the case made, and, in so far as correct, they were covered by charges given. The charges given without request fairly submitted the case to the jury, while some refused would have entitled the appellant to recover, notwithstanding the injury may have resulted from the contributory negligence of the deceased, if there was the slightest neglect on the part of the defendant in regard to matters which in no way could have contributed to the injury.

The deceased was sitting on the railway track, and there is not a particle of evidence tending to show that he was compelled to

Contributory negligence of deceased. be there, or in any manner detained there by the faulty manner in which the railway may have been constructed, nor tending to show that he might not have travelled on the street without entering on the track of the railway. However, the condition of the track was an unimportant inquiry. A high degree of care is necessary on the part of a railway company in operating its trains or locomotives on any part of its road, and especially so in the streets of a town or city, though such streets may be in the suburbs, and but little used; but if, while so operating its road, one fully capable, mentally and physically, to take care of himself, enters upon and remains on its roadway until he is injured by an approaching train or locomotive which he might see and hear by the use of his senses, then it must be held that the contributory negligence of such a person will defeat a recovery by him, or by one who can recover only on such facts as the injured person could have recovered on had he not died through the injuries received by him. There is nothing in the evidence tending to show that the deceased was not in mind and body sound, nor that he was wanting in any of the senses necessary for him to perceive and avoid danger; and the rule which denies a recovery to one whose contributory

negligence brings about the injuries complained of finds application.

There is no error in the judgment, and it will be affirmed.

BATTISHILL

v.

HUMPHREYS *et al.*

(*Michigan Supreme Court, June 8, 1888.*)

Negligence — Personal Injuries — Argument of Counsel. — In an action against a railroad company to recover damages for personal injuries, the court will not set aside the verdict because counsel for the plaintiff stated, in his argument to the jury, that the fireman in charge of the train was susceptible to the attractions of women, and had been allured from his duty; that on a former trial of the case the jury found that there was no negligence on the part of the plaintiff's parents; that there was the same state of facts at the former as in the existing trial; that there was a conspiracy between two of defendant's witnesses to defeat the plaintiff's recovery, although there was no testimony on the subject; and that the attorneys for defendant, the Wabash system and Vanderbilt system, get \$15,000 a year, and appealed to the prejudices of the jury with regard to Vanderbilt and Gould.

Same — Evidence — Sufficiency. — In such action, three persons testified to seeing the plaintiff, a child of between two and three years of age, upon the track, and the train approaching several hundred feet away; and those in charge of the train testified that they occupied positions where they could have seen the child, had he been upon the track, and swore that they did not see it. *Held*, that there was sufficient evidence to justify a finding of gross negligence on the part of the defendant.

Same — Contributory Negligence. — Where those in charge of a train are guilty of reckless negligence in running the train without keeping a proper lookout, and thereby injure a person upon the track, the question of contributory negligence does not arise, if the train-men might by the exercise of reasonable diligence have prevented the accident.

ERROR to Wayne County Circuit Court.

Action by Maud Battishill, an infant, by her next friend, against Solon Humphreys and another, receivers of the Wabash, St. Louis, & Pacific Railroad Company, to recover damages for personal injuries. Defendant appeals from a judgment for the plaintiff. The opinion states the facts. The following are the exceptions referred to by the court: —

"*Exception 1.* Because the plaintiff's counsel, at the trial, stated before the jury that the testimony with regard to the attention of the firemen of the engine being attracted from his duty by some girls by the wayside, was all gone over on the first

trial of this cause; and the counsel for defendants then and there excepted. *Exception 2.* Because the plaintiff's counsel, on cross-examination, inquired of the said fireman, 'Was the whistle blown at Clark Street?' And said question was objected to, as immaterial. Objection was overruled, and the defendants then and there excepted. *Exception 3.* Because the plaintiff's counsel asked Henderson, the conductor, on cross-examination, whether or not he had given certain testimony on the former trial. Defendants' counsel objected that the stenographer's notes of such testimony, showing the language of the witness, should be produced, and the court said that ought to be the method pursued; but the court ruled that the witness must answer the question, 'Yes' or 'No.' The defendants then and there excepted. *Exception 4.* Because, after the testimony was terminated on both sides, the plaintiff's attorney proceeded to argue the case to the jury, and said that he knew of some testimony which the defendants might have introduced with regard to the presence of the child upon the track, and which he had not introduced; and to that statement, before the jury and to the jury, the defendants' counsel then and there excepted. *Exception 5.* Because the plaintiff's counsel stated, in his argument to the jury, that Newberry, the fireman, called at the last trial by defendants, was not now called, and that he was a person susceptible to the attractions of women, and was a man whom women could allure from his duty, and that said Newberry was undoubtedly allured; to which statement to the jury the defendants' counsel then and there entered his exception and protest, and the court said that ought to be excluded; but the effect of the unlawful statement to the jury was not cured. *Exception 6.* Because the plaintiff's counsel, in his argument to the jury, stated that the jury, on the former trial of this cause, found that there was no negligence upon the part of the parents of the plaintiff; to which statement the defendants' counsel then and there excepted. *Exception 7.* Because the plaintiff's counsel, in his argument to the jury, stated to the jury that there was the same state of facts at the former trial as in the existing trial, and read from the printed record which had been before the Supreme Court, in the presence of the jury, to establish it; to which the defendants' counsel then and there excepted. *Exception 8.* Because the plaintiff's counsel, in his argument to the jury, charged that there was a conspiracy between two witnesses for the defendants, named Bailey, father and son, to defeat the plaintiff, — there being no testimony on the subject; to which statement the defendants' counsel then and there excepted. *Exception 9.* Because the plaintiff's counsel, in his argument to the jury, appealed to the prejudices of the jury with regard to W. H. Vanderbilt and J. Gould; and defendants' counsel then and there excepted

to the statements, as irrelevant and immaterial, not involved in the issue, and wrongly presented, and plaintiff's counsel then and there apologized; but the error was not cured. *Exception* 10. Because the plaintiff's counsel stated to the jury that the attorneys representing the defendant, Wabash system and Vanderbilt system, get \$15,000 a year, as bearing upon the amount of the verdict which the jury should give the plaintiff; and the defendants' counsel then and there excepted, and the plaintiff's counsel then stated that the defendant railroad system could afford to pay plaintiff \$15,000.

Alfred Russell for appellants.

Levi T. Griffin for appellee.

CHAMPLIN, J. — This is a suit for personal injuries to a little girl two years and seven months old. The child's parents lived on Ferdinand Avenue, in Detroit, a street which Facts. crossed the track of the Wabash, St. Louis, & Pacific Railway Company at right angles at about 150 feet distant from the house. The case was before us at the January term, 1887 (29 Am. & Eng. R. R. Cas. 411), and we refer to the report of the case for a map showing the location of the place of the accident and the surroundings. It appears from the testimony that plaintiff was injured on the afternoon of a July day in 1884. Her father was a street-car driver, and was absent from home at the time, attending to his daily avocation. His family consisted of his wife and two children, and his wife's father, then about eighty years old. The youngest child was then a baby. His wife attended the family, and did the marketing. Mrs. Battishill, the plaintiff's mother, testified that, on the day of the accident, she went up to the city to buy groceries, and see her sister, who was sick; that she took the street-car at half-past two, leaving the plaintiff at home in the care of her father, who was eighty-one years old and in ordinary health. She left her youngest child at home asleep. Her father was lying down when she left the house, but said he would get right up when she left the little girl with him. She did not take the plaintiff with her up town to get the groceries, because she could not carry her basket with the child. She knew the railroad was close by, but she never knew the child to go near it before. She had been in the habit of going away and buying groceries, and leaving the child. She reached home between four and five o'clock, and found her child had been injured, and the doctors there. The child's leg had been crushed between the foot and knee, and the surgeons amputated the limb between the knee and hip. In some manner, not explained, the child had gone upon the track of the railroad operated by defendants as receivers, and was injured at or near the point where

Summit Avenue crosses the railroad track. George Lewis testifies to having witnessed the accident ; and he says that plaintiff, when he first saw her, was on the track going across a culvert, going towards home. She was pretty near the middle of the culvert. He saw the train coming, and ran down, and tried to catch her off. She was walking across the culvert, with her feet on both sides of the rail. He tried to pull her off, but her stocking caught, so that he could not, and the train ran over her leg. There is a clear view of the track west from Summit Avenue for two or three miles, and also from that point east to Clark Avenue. The train of cars which did the injury was composed of an engine and tender, and four or five freight-cars. The engine and tender were running backwards, drawing after them the freight-cars. The train was properly manned with an engineer, fireman, conductor, and one brakeman. The engineer and fireman were at their proper stations, and the brakeman was upon the top of the car at the west, and the conductor on the top of the east car. The train was going east. All of these who were sworn — and they were all sworn except the fireman, who was absent from the State — testified that they were keeping a proper lookout, and none of them saw the child upon the track, or were aware of the accident until after they were informed of it upon their return to Delray. The distance from Summit to Clark Avenue is 320 feet. John Levison was loading cinders on a car which stood on a side track five car-lengths west from Clark Avenue. He saw the child on the track on the crossing at the culvert, and the train at the time was at John C. Street, which is 492 feet west from Summit Avenue. It was coming towards him at the rate of about three miles an hour. He looked away when the train got close to the child. He then, with Mr. Brandt and Mr. Ridgedale, went and picked up the child. They found her 10 or 12 feet from the cattle-guard at the crossing, inside in the middle of the track between the rails. The train was going towards the city, and did not stop. They took the child to her father's house. He testified that there is a straight track to the west to Delray, which is about two miles and a half, and there was no obstruction to the view. Frederick Brandt testified that he was, with Levison, loading cinders into the car. He first saw the train at Junction Avenue. This, by measurement testified to by Mr. Battishill, would be a distance of 798 feet west from Ferdinand Street. He says that he saw the child upon the track before she was run over. She was on Summit Avenue, on the track ; and he saw the train come up, and run over her. It was running faster than he could walk, — say, five miles an hour. The train went on to the city without stopping. As soon as he saw that the child had been run over, he and his two companions

ran to her, and found she had a leg off ; and they picked her up, and carried her home. . There was testimony introduced which tended to show that those in charge of the engine failed and neglected to give the required and usual signals of alarm upon approaching the Summit-avenue crossing ; and, on the other side, the testimony was positive that such signals of alarm were given. On this point the question was properly submitted to the jury.

Several of the errors assigned relate to the method pursued by the plaintiff's counsel in conducting the trial. It is improper for counsel engaged in a second trial of a cause to state, in the presence and hearing of the jury, what occurred upon the former trial ; and where the court can see that the remarks were likely to influence or prejudice the jury, the judgment will be reversed for that cause. It is competent, however, to interrogate a witness as to testimony given by him upon a former trial, for the purpose of refreshing his recollection or of impeaching him. I do not think the first exception taken well grounded.

Conduct of trial.

The fourth exception was taken to the remarks of counsel for plaintiff while addressing the jury, and the objectionable remarks stated by counsel for defendants were excluded by the court on exception being taken, as were also the remarks which were the subject of the sixth exception. The seventh, eighth, ninth, and tenth exceptions purport to be based also upon the remarks of counsel in his argument to the jury. The record does not show the remarks made, or the connection in which they were made ; but, in taking the exception, the counsel embodies certain expressions as having been made by the counsel for plaintiff. As some of these were disputed by counsel at the time, we cannot assume that he was correctly quoted in the exception. Others not disputed may be assumed to have been made. In some instances, when exceptions were taken, the court corrected counsel for plaintiff at the time ; and, with respect to the eighth, he took occasion to correct him in his charge to the jury, as requested by counsel for defendants. Upon the whole matter of the exceptions to the remarks of counsel, while we do not approve, yet we cannot say that they were likely to or did mislead or prejudice the jury against defendants. Extravagant expressions are apt to be used in the heat of argument, invective is sometimes resorted to, persuasions used, and forensic skill employed, all with the design to influence the jury in behalf of a client. But all these arts and appliances are permissible so long as confined within legitimate bounds of the discussion of the facts before the jury ; and if courts are to take it upon themselves to set aside verdicts because

Propriety of counsel's remarks to jury.

some irrelevant remarks are made use of by counsel in their arguments, they will find constant employment, and few indeed will be the verdicts which will be sustained.

The twenty-first assignment of error is based upon the refusal of the court to instruct the jury that there was no evidence to support the third count of the declaration. That count averred that it was the duty of the defendants to use and exercise proper

Sufficiency of evidence to justify finding gross negligence. care and precaution in the running of their trains, and to employ competent and careful lookouts, agents, and servants, who should be stationed on or about the locomotive engines of its trains, who should be attentive to their duties, and, in case of apprehended danger, who should arrest the engines of its said trains, and stop the same, in time to avert danger and accident, and to otherwise exercise proper care and precaution in giving the signals of warning required by the statute in such cases made and provided; yet the defendant, neglecting their duty in that behalf, neglected to exercise such reasonable care and precaution aforesaid, recklessly, wantonly, and maliciously ran and propelled one of its trains over the said plaintiff, who was then an infant about three years of age, without stopping the train in time to avoid the accident and injury to the plaintiff, when the said train, by the exercise of proper care and precaution upon the part of defendants, and without recklessness and wantonness on their part, might have been arrested and stopped. It also averred that the plaintiff was in the exercise of due care upon her part. The learned counsel for the defendant insists that there was not a particle of testimony to support this count, because the engineer, the conductor, and the brakeman in charge of the train, all and each, testified that they were upon the lookout, and did not see the child. We do not think the conclusion follows from the testimony in the case. At least three persons testified to seeing this little girl upon the track when she was run over. The place where the accident happened was in the township of Springwells, then a suburb of the city of Detroit, and now included within the city limits. It would have been reckless negligence for persons employed by defendants to have started this train at the junction, and left it to proceed into the city, without any one on board, and having control thereof. It would likewise have been reckless for such train to have been run without any person to look out for accident or danger to individuals upon the track or upon the street crossings, which were numerous in that locality. It would be no less reckless for such train to be run while the person charged with the duty of keeping a lookout to avoid danger or accident, neglected such duty. What is the inevitable conclusion from the testimony? When three persons on the train

testify that it was their duty to keep a lookout, and two of them testify that they occupied positions where they could have seen the child, had it been upon the track, and swear they did not see it, and three witnesses swear they saw the child upon the track, and the train approaching several hundred feet away, and the child is run over in the broad light of a summer afternoon, were the persons in charge of that train performing their duty of keeping a lookout, or not? If they were, they would have seen the child in time to stop the train and avoid the accident. If they had seen it upon the track the same distance from it that Levison and Brandt saw it, they could have stopped the train, and avoided the injury to plaintiff. That they did not see it under the circumstances is conclusive proof that they did not keep a proper lookout. As well might the train have been run with no one in charge. It would have been no less reckless and less culpable than with four men in charge, to run over this child, who was upon the track in plain sight, without seeing it. It shows in these men a reckless indifference to their duty under the situation and surroundings. The law does not require impossibilities, but it does require care on the part of persons in charge of such dangerous machinery and force. What others saw in looking along the track, these employees could have seen; and that they did not observe the child under the circumstances, shows them guilty of reckless negligence. The defendants being guilty of reckless negligence, under the circumstances disclosed by the testimony, in running their train without keeping a proper lookout, and in consequence thereof having run over plaintiff and injured her, the question of contributory negligence does not arise, even had the plaintiff been of that age at which the law would have imposed upon her the duty of exercising due care to avoid injury. Having reached this conclusion, it would be unprofitable to discuss the subject of imputed negligence, as the disposition of the case does not depend upon that question.

Question of contributory negligence does not arise.

The judgment is affirmed.

Sherwood, C. J., and Morse, J., concurred.

CAMPBELL, J. — I concur in the conclusion that the case presented by the testimony was such that the jury had a right to find as they did, and that there was no legal error in the rulings. I concur, therefore, in the affirmance.

Long, J., did not sit.

Improper Remarks of Counsel as a Ground for Reversal. — See *Gulf, Colo. & S. F. R. Co. v. Fox*, 33 Am. & Eng. R. R. Cas. 543; *Chicago & A. R. Co. v. Pittsburgh*, 31 Ib. 24; *Huckshold v. St. Louis, I. M. & S. R. Co.*, 28 Ib. 659; *Straus v. Kansas City, etc., R. Co.*, 27 Ib. 170; *Bullard v. Boston, etc., R. Co.*,

27 Ib. 117; *International, etc., R. Co. v. Irvine*, 23 Ib. 518; *East Tenn., etc., R. Co. v. Gurley*, 17 Ib. 568; *Festner v. Omaha, etc., R. Co.*, 20 Ib. 238; *Central R. Co. v. Mitchell*, 1 Ib. 145.

HOUSTON

v.

VICKSBURG, SHREVEPORT, & PACIFIC R. CO.

(*Louisiana Supreme Court.*)

Action for Wrongful Killing — Venue. — Under the provisions of the Louisiana Practice Code, an action against a railway company to recover damages for wrongful killing may be brought in the parish where the damage was done.

Negligence — Speed of Train. — While travelling in an open country not thickly populated, any conceivable rate of speed, no matter how great, if it be consistent with the safety of passengers, is not negligence *per se*, in the absence of a statute imposing a limit.

Trespasser on Track — Injuries causing Death — Contributory Negligence. — In an action to recover damages for the wrongful death of plaintiff's intestate, it appeared that at the place where the intestate was killed, the deceased was in hearing of the cars, and in view of them for a distance of from 400 to 600 yards; that she was in the full possession of her faculties, mental and physical; that, when the engine sounded the whistle, deceased, instead of stepping from the track, commenced to run along it in the same direction that the train was going, and the train struck her and killed her. *Held*, that the want of ordinary care on the part of the deceased was the proximate cause of her death, and that there could be no recovery.

Same — Mental Condition. — The fact that a person killed upon a railroad track was rendered mentally incapable of saving himself by the appalling situation in which he was placed, will not relieve him from the imputation of contributory negligence, unless such mental condition was brought about by some fault on the part of the railroad company.

Same — Death of Child — Negligence of Parent. — In an action for damages for the wrongful death of plaintiff's child, where it appears that the child met its death at the same time as its mother, that it was under the latter's control, and that the deaths were caused by the failure of the mother to exercise ordinary prudence, there can be no recovery.

APPEAL from Third Judicial District Court, Lincoln Parish.

Action to recover damages for the negligent killing of the plaintiff's wife.

The opinion states the case.

Barksdale & Vanhook and *Graham & Gaskins* for plaintiff and appellee.

F. P. Stubbs for defendant and appellant.

¹ TRESPASSER ON TRACK. — See *ante*, *Kennedy v. Denver, S. P. & Pac. R. Co.*, 40, and note 47; *Guenther v. St. Louis, I. M. & S. R. Co.*, 47, and note 55.

TODD, J. — This is a suit of the plaintiff in his own right, and as tutor of his minor children, for \$22,500 damages resulting from the death of his wife, Mrs. Georgia Houston, and infant child, run over and killed by the train of the defendant company on the 13th of January, 1885. It is charged in the petition that the killing was wantonly and recklessly done, and might have been avoided by ordinary care and prudence on the part of the employees of the railway company. The answer is a general denial, and an averment that the death was caused by contributory negligence on the part of the deceased. The case was tried by a jury, who, by a majority, returned a verdict in favor of the plaintiff for \$13,970, individually and as tutor, one-half in each capacity; and from the judgment on this verdict the defendant company has appealed. There was a plea to the jurisdiction *ratione personæ* filed, which was over-ruled. This ruling was proper under the provisions of paragraph 9, Code Pr. art. 165, authorizing an action of this kind to be brought in the parish where the damage was done. This article was not repealed by the charter of the company. *Montgomery v. Louisiana Levee Co.*, 30 La. Ann. 607. Besides, from the silence of the defendant's counsel, we infer that the correctness of the ruling on this point is not questioned.

Venue of
action.

The facts of the case are, substantially and briefly, these: The deceased, carrying her infant child, and accompanied by her sister, was walking on the railroad track, returning from a visit to a neighbor, and going eastward to their home, which was on a public road running parallel with the track of the railroad, and about 150 yards distant therefrom. The train, bound in the same direction that the deceased and her sister were going, approached them. The latter stepped from the track, and the train passed by her. The former was, however, overtaken at or near a crossing of the road to which she was hurrying, was run over and killed, together with her infant child. The fault charged against the company, from which this deplorable calamity is alleged to have resulted, was the unusual and extraordinary speed at which the train was then and there being propelled, and the failure to give a timely warning, by the required signals, of the rapid approach of the train, and the failure to stop the train in time to avoid the casualty. The contributory negligence charged was alleged to be, that notwithstanding the train was seen and heard by the deceased at a sufficient distance and in sufficient time to have afforded her ample opportunity to get off the track, and thus avoid all danger, that she persisted in remaining on the track after the train had been heard and seen, and after the signals had been timely given by the ringing of the bell and the blowing of the whistle, and

Facts.

when there existed no impediment to her quitting the track in a moment. And it was charged that her death was caused, not by the fault of the company, but by her own negligence in failing to take ordinary care to avoid the threatened danger.

There is a conflict in the testimony respecting the rate of speed at which the cars were running at the time of the disaster.

No rate of
speed negli-
gence per se.

The plaintiff contends that the train was moving at a speed of 25 or 30 miles only. We cannot see that this is a material inquiry. There is in this State no statutory regulation of the speed on railways. Of course, it would evince a criminal negligence to move a train at a high rate of speed through cities, towns, or villages, or other places where people are accustomed to throng; but, considering that railroad companies are entitled to the exclusive use of their track or road-bed, there is no reason why, in an open country, not thickly populated, the mere probability that a person or persons might occasionally walk on the railroad track should be made a factor in this question of speed on railroads. A high rate of speed has always been a great *desideratum*, and engineering skill has been taxed to the utmost to attain it; and we conceive the reasonable and established rule on this subject to be, that no conceivable rate of speed, consistent with the safety of passengers, is *per se* negligence. *Pierce, R. R.* 354; *Ror. R. R.* 1066. In the case before us, for instance, what mattered it at what rate of speed the train was moving, if the deceased could, if she chose, have stepped off the track, and was not prevented from doing so by the speed at which the train was running? Under this view of the subject, we cannot discover any fault of the company in connection with this question of the rate of speed at which the train was then moving.

Was the company in fault in failing to give a timely warning, or in stopping, or attempting to stop, the train in time? This is

Giving signals
and endeavor-
ing to stop.
Testimony of
engineer.

what the engineer says on this point: "I was between three hundred and four hundred yards from them when I first discovered them. I rang the bell and blew the whistle, to call their attention to the coming train. Both looked back, saw the train, and they turned around, and both walked on a few steps, when one of them stepped off on the north side of the track. I expected the other one to get off any moment, as one does that is walking on the track that way. She never showed by her actions that she was frightened, was out of her mind, or deaf. She commenced running down the track ahead of the engine. In the mean time I was getting very close to her. I thought she would not have time to make the crossing before I got to her, so I reversed my engine. [Then he describes the effect of revers-

ing an engine.] The reason I reversed the engine on this occasion was to try to save the woman. There was no other means that I could have used to avert the accident. I used all the means I had. It is no unusual thing to see persons on the track ahead of an engine. I never before saw an occasion on which they did not step off to the side of the track. I don't think I can recall a trip that I ever made over the road in the day-time where I did not see persons ahead of the engine on the track. I was engineer in charge of the locomotive. There was nothing undone by me that could have been done to avoid the accident."

There is some conflict between this statement and that of other witnesses, especially as to the distance between the train and the deceased when the warning signals were given; it being stated by one or more witnesses that the space between them was not more than 50 yards when the whistle sounded. Be that as it may, however, considering that the deceased was in hearing of the cars, and in view of them for a distance of from four to six hundred yards; that she was in the full possession of her faculties, mental and physical, and the engineer had the legal right so to presume; and that ordinary care for her own safety, and the instinct of self-preservation, would move her to step off the track, which her sister had already done,—the engineer was not in fault in not sooner realizing and appreciating the imminence of the peril, and in not sooner taking steps to avoid it. It is equally clear, from the facts stated, that the death of the deceased was really caused by the want of ordinary care on her part. It was entirely in her power to save herself by the exercise of such care. There was not the slightest difficulty in the way, as was apparent from the easy escape made by the sister of the deceased, who was shown to be of defective eyesight, and therefore not as capable of taking in the situation, or discovering its peril, as the deceased.

Same. Death caused by want of ordinary care.

The doctrine of contributory negligence, in brief, is, that a person cannot recover for an injury to which he has contributed by his own want of ordinary care. Thomp. Neg. 1148.

In the case of Railroad Co. v. Jones, 95 U. S. 442, Mr. Justice Swayne, as the organ of the court, states the following legal propositions, which we quote here,

The doctrine of contributory negligence.

as peculiarly applicable: "One who, by his negligence, has brought an injury upon himself, cannot recover damage for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But, when the defendant has been guilty of negligence also in the same connection, the result depends upon the facts. The question in such cases is: (1) Whether the damage was occasioned entirely by the negligence

or improper conduct of the defendant ; or (2) whether the plaintiff himself so far contributed to the misfortune, by his own negligence, or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case plaintiff is entitled to recover ; in the latter he is not." See also *Railroad Co. v. Houston*, 95 U. S. 697.

It is suggested by the plaintiff's counsel that the deceased was evidently confused and bewildered by the appalling situation in which she found herself, and that therefore the principle of contributory negligence could not be imputed or applied to her acts and conduct. We think it highly probable that her mental condition was such at the time as stated, so extraordinary was her conduct ; but unless that condition was brought about by some fault of the defendant company, the deceased cannot be relieved from the imputation or effect of contributory negligence ; and such fault we have failed to find, as already stated.

With respect to the death of the infant child, and the effect of the neglect of the mother as bearing thereon, the doctrine is correctly stated thus : "If the parent is personally present, controlling the movements of the child, the parent's negligence will defeat an action for an injury to the child in like manner as if he suffered the injury himself." *Pierce*, R. R. 338 ; *Ror. R. R.* 1031-1037, 1070, 1071.

Reaching these conclusions, we are compelled to reverse the judgment appealed from. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, and that the demand of plaintiff be rejected, at his costs in both courts.

No Rate of Speed Is Negligence per se. — See *New York, etc., R. Co. v. Kellams*, 32 Am. & Eng. R. R. Cas. 114, note, 120.

Contributory Negligence of Parent as Bar to Child's Recovery. — Note, 31 Am. & Eng. R. R. Cas. 420. See note, 29 Am. & Eng. R. R. Cas. 439 ; note, 25 Ib. 362-543 ; *St. Clair Street R. Co. v. Eadie*, 23 Ib. 269, note, 273.

REILLY *et al.*

v.

HANNIBAL & ST. JOSEPH R. CO.

(*Missouri Supreme Court, March 5, 1888.*)

Negligence — Wrongful Killing — Authority of Servant — Knowledge. — Consent. — In an action by parents to recover damages for the wrongful killing of their child by a switch-engine, it appeared that at the time of the accident the engine was being used to take certain of defendant's employees home for supper; that it had been so used for a considerable time with the knowledge of the yard-master; and that the superintendent had seen it while being so used, although it did not appear from his testimony that he understood it to be used solely for that purpose. *Held*, that there was sufficient evidence to enable the jury to infer that the engine was being employed in such service with the knowledge and acquiescence of the defendant.

Same — Gross Carelessness — Proximate Cause. — In such action it appeared that the child wandered out of the house on the defendant's track, and sat down on the end of a tie; and that, while sitting there, he was beheaded by the switch-engine, which was running at a speed variously estimated to be from eight to twenty miles an hour. It was also shown that there was nothing to hinder those in charge of the engine from seeing the child at a distance of ninety or a hundred yards if they had looked; and that some travellers on an adjoining street had warned, or attempted to warn, those on the engine of the danger. *Held*, that the facts in evidence were sufficient to show that the killing occurred through the gross negligence of those running the locomotive.

Same — Contributory Negligence — Infant. — In such action, the question whether, after setting a cup of bread and milk on a chair before the child, the act of the mother in leaving him while he was eating, and going into an adjoining room to attend to her duties, so that in her absence he strayed out of the house, was or was not negligence on her part, was for the jury.

Witness — Competency of Party. — In an action to recover damages for the death of a child in which husband and wife are joined as co-plaintiffs, the wife is a competent witness.

APPEAL from Monroe County Circuit Court.

Action to recover damages for the death of plaintiffs' child.

The opinion states the case.

Prosser Ray, Frank Walker, and Strong & Mosman for appellant.

R. E. Anderson for respondents.

NORTON, C. J. — This suit was instituted in the Hannibal Court of Common Pleas by plaintiffs to recover damages for the death of their infant son, aged sixteen months, alleged to have been occasioned by the negligence of defendant in running a switch-engine over Collier Street, in the city of

Facts.

Hannibal. The venue of the cause was changed to Monroe County, where, upon a trial, plaintiffs had judgment for \$5,000, from which the defendant has appealed, and assigns as the chief ground of error the action of the court in refusing to sustain a demurrer to the evidence, and in giving and refusing instructions. The evidence tends to show the following facts: That the track of defendant's road is laid on Collier Street, in the city of Hannibal, which runs east and west, and is intersected by Fourth, Fifth, Sixth, and Seventh Streets, which run north and south; that plaintiffs lived on a lot south of and abutting on said Collier Street; that their house stood several feet back from the street, and was enclosed with a fence, in which there was a gate opening out on the street; that between this gate and the railroad track there was a space of several feet. It further appears that plaintiffs, at the time of the accident, had five children, aged respectively twelve, ten, five, and three and a half years, — the youngest son, Willie, who was killed, being sixteen months old; that plaintiffs had several cows, and sold milk; that the accident occurred about six o'clock in the evening; that plaintiffs had milked their cows, and the father was driving them to pasture, and the two oldest children had been sent with milk to their customers; that the mother, after giving Willie, the youngest child, in the front room of the house, a cup of bread and milk, left him eating a piece of bread, and went into an adjoining room to strain milk, and in about five minutes was informed that the child had been run over and killed by one of defendant's engines. She testified that she did not know whether the door of the house and the gate were open or not; that she did not miss the child till informed of his death. It further appears that the child, after being thus left, wandered out of the house onto the street and defendant's track, and sat down on the end of a tie on the south side of the track, eating a piece of bread; that, while sitting there, he was beheaded by one of defendant's locomotives or switch-engines running at a speed variously estimated by the witnesses to be from eight to twenty miles an hour. The evidence also tended to show, that, when the engine had approached within 90 or 100 yards of the place where the child was, two men in a wagon on the south side of Collier Street, seeing the dangerous situation of the child, warned those on the engine of the danger; one of them testifying, that, as the engine was passing within 16 feet of them, he threw up his hands, and hallooed as loud as he could "that they would run over the child; there is a child on the track; look out for the child;" "that the men on the engine did not pay any attention;" that he hallooed loud enough to be heard 30 yards; that the engine was running 15 miles an hour; that he could not see the spokes of the driving-

wheels, — that they looked solid; that the wagon he was on, as well as the engine, made considerable noise; that neither bell was rung nor whistle sounded. The evidence is clear that there was nothing to prevent those in charge of the engine from seeing the child, had they looked. It is also shown that switch-engine No. 13, which beheaded the son of plaintiff, was, at the time the accident occurred, being run for the purpose of carrying Mr. Ham, in the employ of defendant as foreman of the roundhouse and assistant master-mechanic, out to his supper on Lyon Street, between Ninth and Tenth Streets, where he lived. The evidence further shows that for six weeks or more previous to the accident this switch-engine had been run at least twice a day out on Collier Street to Eleventh Street, — a little over one mile, — for the purpose of carrying Ham and other employees of defendant back and forth to their meals, — down in the morning to the shops, back at noon to dinner, and back again to supper, and then down to the shops; that it was run under the management of Ham; that Ham was on the engine, with Wilson as engineer and Graham as fireman; that Wilson's eyes were very poor; that the week before, he had been in St. Louis under care of Dr. Green, an oculist; that he had been laid off almost two years on account of his eyes. The evidence tended to show that Ham, under his employment, had no control over the movement of switch-engines after they left the roundhouse; that the exclusive right to control the movements of all engines after they left the roundhouse was in the yard-master of the switch-engines while in the yards, and in the train despatcher and superintendent after they leave the yards.

Mr. Lessner, the night yard-master, testified that he saw switch-engine 13 go out, and Wilson as engineer, and Graham, fireman, and several others, were in it; that the engine was used to carry Ham to his supper; that he never reported to the yard-master, Moore, detentions caused by the use of the engine to carry Ham to his meals; that he thought Moore had seen the use of the engine, as his opportunities were good; that he never reported the fact to Superintendent Woodward, because he thought it was Moore's business to do so. He further stated that he had no authority as night yard-master to send engine 13 out on Collier Street for any purpose other than for switching and making up trains; that he did not know whether Moore as day yard-master had such authority, and could not say whether he could have stopped Ham in such use of the engine.

Woodward, a witness on part of defendant, testified that in 1879 he was superintendent of the road; that his office hours in Hannibal were from nine o'clock in the morning till five o'clock in the evening; that he and General Manager Carson were the

only officers of defendant with authority to permit an employee at the car-shop or roundhouse to be carried on an engine from the yards to the west part of the city for their meals; that such an order from Carson would have to pass through his office; that he never gave Ham any permission to use an engine to transport him back and forth to his meals, and that up to the time of the accident he did not know that the engine had been so used; that neither the night nor day yard-master had authority to permit Ham to use an engine for any such purpose; that he generally went to his meals between half-past twelve and half-past one o'clock; that in passing over the track he could see an engine on the track a half-mile in a western direction; that he had seen the engine hundreds of times in going to and back from his meals, but knowing that they were doing work in the yards, would say nothing; that he would hardly ever see an engine go up there but there would be a half-dozen persons on it. He was asked if he knew what the people who were on the engine were doing at the time he saw them, to which he answered he did not; and in answer to the question if they were employees of the road, and what their object was in being transported, he thought some were employees, and that their object was to get a ride as near home as possible. He further stated that it was the duty of the agent and the yard-masters to know to what uses the switch-engines were put; that up to that time he never called for any report, and never received any, as to how the main track was being used.

Graham, the fireman, testified that the track was clear; that his attention was attracted to some teams at Seventh-street crossing, which was beyond where the child was sitting, and that he happened to cast his eyes down nearer than he had been looking, and saw the child only seven or eight feet distant.

Wilson, the engineer, testified that they started out to take Ham home; that they had no switching to do out where they were going, and that he did not see the child until it was run over; that after he got over Sixth-street crossing 30 or 40 yards, Ham hallooed to him to stop, after which he did all he could to stop; that he had no permission from the general manager, superintendent, or train despatcher to take Ham out to his meals: the permission he had was from Ham.

Ham testified that the engine made the runs to carry him home, and went at his request, and that it did no other business on that trip; that he had no contract with the company to be carried to his meals; that he had no permission from Carson or Woodward for such use of the engine, and that Woodward and Carson had no knowledge of such use, that he knew of.

It is insisted that the court erred in not sustaining a demurrer

to this evidence. A demurrer to evidence admits the facts which it establishes or intends to establish, as well as all inferences which may be fairly drawn from them ; and in view of the fact that the evidence clearly shows that the use to which said engine had been put by the employees of defendant for from six weeks to three months before the son of plaintiff was killed was a notorious fact, well known to the employees of defendant, including the night and day yard-masters ; and in view of the further fact, that, while the superintendent of the company testified that the use to which the engine was put was without his authority or knowledge, he in point of fact was in a position to know all about it, and stated in his evidence that he had frequently seen the employees and others riding on the engine, and that their object was to get a ride as near their home as possible, the inference can be fairly drawn that such use of the engine was acquiesced in or consented to by the company. Proof of the notoriety of a fact is competent to show notice or knowledge of it by another. *Cramer v. Express Co.*, 56 Mo. 524. "He who has knowledge of facts sufficient to put him upon inquiry is chargeable with notice of the fact which inquiry would disclose." *Eyerman v. Bank*, 84 Mo. 408; *Fellows v. Wise*, 55 Mo. 413; *Cornet v. Bertelsmann*, 61 Mo. 118. The general office of this defendant was at Hannibal. Its general superintendent and general manager had offices there. One of them lived at Palmyra, and made his office hours from nine o'clock in the morning till five o'clock in the evening ; the other lived at Quincy, and was frequently in Hannibal. These facts, in connection with the further fact that this switch-engine had, according to the evidence, been used from six weeks to three months previous to the accident in transporting defendant's foreman of the roundhouse and assistant master-mechanic and other employees back and forth to their meals, and that such fact was notorious, justified the court in submitting, as it did, the question to the jury as to whether such use of the engine was known to the company, and acquiesced in or consented to by it, and whether, in assenting to such use, the employees so using it were engaged in the business of the company. If it had appeared in evidence that the company had agreed with Ham and other employees in employing them to transport them back and forth to their meals in the switch-engine, no question, we apprehend, could have been raised but that such-use would be in the business of the company.

Acquiescence of company in use of engine.

It is manifest from the facts in evidence that the life of the child was sacrificed through gross carelessness of those running the locomotive ; and the court could not have taken the case from the jury on the ground

Death of child. Gross negligence.

that such negligence occasioned the injury, nor could the court have declared, as a matter of law, that the negligence of plaintiffs was the proximate cause of the injury, and taken the case from the jury on that ground.

As to whether, after setting a cup of bread and milk on a chair before the child, the act of the mother in leaving him while he was eating, and going into an adjoining room to strain milk, was or not negligence on her part, was

Negligence of mother.

for the jury, under proper instructions. She, as a prudent person, might well have supposed that the attraction of his frugal meal would be sufficient to keep him there during her absence, or that, if he left it, it would be to follow her into the room she went into. *Petty v. Railway Co.*, 88 Mo. 306; s. c., 28 Am. & Eng. R. R. Cas. 618; *Drain v. Railway Co.*, 86 Mo. 574.

It is insisted that the court erred in allowing Mrs. Reilly to testify, she being a co-plaintiff with her husband. It is expressly stated in the case of *Bell v. Railroad*, 86 Mo. 599, that in such cases as this the wife is a competent witness.

Wife as witness.

Various objections are made to the instructions, and among them it is urged that the court erred in giving the two following instructions of its own motion: "(8) Before the jury can find for the plaintiffs in this action, they must establish by a preponderance of the evidence that their child was killed by an engine being run at the time, not only by servants, agents, or employees of the defendant, but also that it was being run upon the business of the defendant, or that said engine was at the time being run by the defendant's authority." "(13) Before the jury can find for the plaintiffs in this action, they must establish by a preponderance of the evidence that their child was killed by an engine being run, not only by servants or agents of defendant, but also that it was being run, at the time the child was killed, upon the business of defendant; and if the jury believe from the evidence that the engine was being run for the purpose only of conveying Mr. Ham, the foreman of the roundhouse, out to the western part of the city of Hannibal, for his own purposes and personal convenience, after quitting his work for the day, and not upon the business of the company, then the defendant is not liable, and the verdict must be for the defendant unless such use of said engine was authorized by the defendant." It is claimed that these instructions are erroneous because there was no evidence tending to show that the engine, when the child was killed, was being run on the business of the company. The objection cannot prevail, for the reason that the record shows that defendant asked the court to give two instructions couched

Objections to instructions considered.

in the language used in those given by the court, with the exception that in the first instruction the court added the words, "or that said engine at said time was being run by defendant's authority," and in adding to the second the words, "unless such use of said engine was authorized by the defendant." Besides, this defendant asked, and the court gave, two instructions requiring the jury, before they could find for plaintiffs, to find either that the engine was being run in the business of defendant, or that defendant authorized the engine to be used in carrying Ham to his home. It is too late for defendant, after having thus invited the court to give such instructions, to insist that the court erred in complying with the request. It is settled in the following cases that one party cannot be allowed to complain of another's instructions, where his own announced the same doctrine, although it be erroneous. *Thorpe v. Railway Co.*, 89 Mo. 650; *Holmes v. Braidwood*, 82 Mo. 610; *McGonigle v. Dougherty*, 71 Mo. 259; *Smith v. Culligan*, 74 Mo. 388; *Davis v. Brown*, 67 Mo. 313.

The question as to whether the plaintiffs or either of them were guilty of such contributory negligence as would prevent a recovery, as well as the question whether the death of plaintiffs' son was occasioned by the negligence of defendant's servants while either engaged in the business of the master or while using the engine by his authority, were all fairly submitted to the jury. Taking the instructions as a whole, as we must do (*Hauschen v. O'Bannon*, 56 Mo. 289; *Porter v. Harrison*, 52 Mo. 526, and cases cited; *Marshall v. Insurance Co.*, 43 Mo. 586), while they may be subject to verbal criticism, the law applicable to the case was fairly embraced in them, and in a way not calculated to mislead the jury. They recognize the correctness of the doctrine that a master is not responsible for the negligent act of his servant, unless done in and about the business of the master, or unless the act in the doing of which the negligence occurs is sanctioned or authorized by him. We discover no error justifying an interference with the judgment, and it is hereby affirmed.

All concur, except Ray, J., absent.

Children Trespassing on Railroad Track.— See *Chrystal v. Troy & B. R. Co.*, 31 Am. & Eng. R. R. Cas. 411, note, 415; *Keyser v. Chicago & G. T. R. Co.*, *Id.* 399.

UNION PACIFIC R. Co.

v.

DUNDEN.

(Kansas Supreme Court.)

Action for Wrongful Killing — Letters of Administration — Conclusiveness. — In an action brought by the personal representative of a deceased minor against a railway company to recover damages for his intestate's death, the company objected that the letters of administration were not properly granted, on the ground that there was no estate to administer. The record of the Probate Court showed that the minor left, among other things, "an estate of personal articles." The minor's father, upon examination, gave testimony which tended to show that his child died without leaving any estate. *Held*, that, the jury having passed upon the facts in issue, including the right of the plaintiff to maintain the action, the evidence of the father was not conclusive as against the general findings of the jury, and that it could not be said as a matter of law that the letters of administration were granted without jurisdiction.

Same — Assessment of Damages — Knowledge of Jury. — In assessing damages for wrongful death, the amount is largely within the discretion of the jury; and they may use their common knowledge and experience, in relation to matters of common observation, without direct evidence of the specific pecuniary loss.

Same — Death of Minor — Value of Services. — In an action to recover damages for the death of a minor caused by the wrongful act or omission of another, the court commits no material error in refusing to require the jury to itemize, in separate or specific amounts, the value of the probable future services of the intestate to his next of kin.

Same — Excessive Damages. — A verdict for \$3,000 in name of damages for causing the death of a minor who at the time was eleven years and eight months old, and was also intelligent, healthy, and promising, and left surviving him a father who was a poor man, working as an engineer of steam machinery, and having a wife and three children, is not so grossly excessive as to require a reversal upon appeal.

Same — Contributory Negligence — Infant. — Although a minor, killed while playing upon a turn-table of a railway company, had sufficient knowledge to know that it was wrong to trespass upon a turn-table, yet, if he had no knowledge that playing upon the table was unsafe or dangerous, it cannot be said that he was guilty of contributory negligence.

ERROR to District Court, Leavenworth County.

Action by William Dunden, as administrator of his son, William Dunden, jun., a minor, against the Union Pacific Railway Company, to recover damages for the wrongful death of his intestate.

The facts are stated in the opinion.

J. P. Usher, A. L. Williams, and Charles Monroe for plaintiff in error.

L. B. & S. E. Wheat for defendant in error.

HORTON, C. J. — Upon the general statement in this case the facts are as follows : William Dunden, jun., was injured on Aug. 16, 1884, on a turn-table located upon the grounds of the Fort Leavenworth military reservation, while playing with other children. From the injuries received he died the next day. At the time of his death he was eleven years and eight months old. Prior to his injuries he was intelligent, healthy, and promising. His father, William Dunden, lived at the time in Leavenworth City, and was not in the best of health. He was a poor man, not owning the house in which he lived. His occupation was that of an engineer of steam-machinery, and he received as wages for his services from seven to eight hundred dollars a year. After the death of his son, his family, other than himself, consisted of his wife and three children ; the oldest being sixteen years of age, and the youngest a year old. The father, as administrator, brought this action against the Union Pacific Railway Company to recover damages for the death of his son. In the petition it is alleged that the death occurred by reason of the negligence of the railway company in leaving the turn-table unlocked and unguarded. Judgment was rendered against the railway company for \$3,000, and that company now seeks to have the judgment reversed.

Facts.

It is claimed that the Probate Court of Leavenworth County had no jurisdiction to issue letters of administration to William Dunden, upon the ground that his son left no estate. The authority for granting letters of administration is found in section 1 of chapter 37 of the Compiled Laws of 1885, which reads, "That, upon the decease of any inhabitant of this State, letters testamentary or letters of administration on his estate shall be granted by the Probate Court of the county in which the deceased was an inhabitant or resident at the time of his death."

The contention is, that there is no provision in the statute for administration, either in the case of a resident or a non-resident, unless there is an estate to be administered. Perry *v.* Railroad Co., 29 Kan. 420 ; s. c., 11 Am. & Eng. R. R. Cas. 663. Whether the rule announced in the foregoing case applies to the issuance of letters of administration upon the decease of an inhabitant of this State, we need not now decide. Letters of administration may be granted upon the estate of a minor, as well as upon the estate of any other person. To the claim that William Dunden left no estate, the answer is, that the records of the Probate Court of Leavenworth County made a *prima facie* showing of jurisdiction to issue the letters of administration. On Feb. 7, 1885, William Dunden made an affidavit before the probate judge that his son, William Dunden, jun., died, leaving, among other things, "an estate of personal

Issuance of
letters of ad-
ministration.

articles." The letters of administration recite "that William Dunden, late of the county of Leavenworth, an inhabitant of said county, died intestate, having at the time of his death property in this State which may be lost, destroyed, or diminished in value, if speedy care be not taken of the same." The administrator gave bond, with two sufficient sureties, in the sum of \$200, as prescribed by the statute. The administrator also made an affidavit before the probate judge "that he would make a true and perfect inventory of and faithfully administer all the estate of the said deceased, and pay the debts as far as the assets would extend, and account for all assets which should come to his possession or knowledge." The records of the Probate Court were read to the jury. The only evidence offered to contradict or rebut the *prima facie* case made was in the cross-examination of the father of the deceased, who testified, among other things, that his son, at the time of his death, had "nothing other than some little change; that what he had in the way of personal effects and clothing he had provided him with; that he had worked at one time for a canning factory, and earned a little money; that he did not know how much of this he had, as that was a matter between the boy and his mother; that, when he earned money, he gave it to his mother; that, while working for the canning factory, he received twenty-five cents a day." Admitting that the evidence of the father was contradictory to and conflicting with the findings and records of the Probate Court, yet it was not conclusive. The personal representative, in cases like this, brings the action, not for himself nor in the right of the estate, but as trustee for the distributees, the next of kin. The jury had the right to pass upon the facts in issue; and, as was said in *Wheeler v. Railroad Co.*, 31 Kan. 640, "We cannot say, from the facts as found by the jury, that the letters of administration issued to the plaintiff in error ought to be revoked."

It is next claimed that the trial court erred in instructing the jury, that, if they found for the plaintiff, they could use their common knowledge in assessing his damages, without evidence as to the amount thereof. The language of the instruction may, perhaps, be criticised; but the instruction, as applied to this case, was neither erroneous nor misleading. In such a case as this the jury may estimate the pecuniary damages from the facts proved, in connection with their own common knowledge and experience in relation to matters of common observation. It is not absolutely necessary that any witness should have expressed an opinion of the amount of the pecuniary loss. Damages are to be assessed by the jury with reference to the pecuniary injury sustained by the next of kin in consequence of such death. This is

Use of common
knowledge in
assessing
damages.

not the actual present loss only which the death produces, and which could be proved, but prospective losses also. How this pecuniary damage is to be measured, or what shall be the amount, must be left largely to the discretion of the jury. The court undoubtedly intended by the instruction to inform the jury, and they must have so understood, that, if they found for the plaintiff, they could use their common knowledge in assessing his damages, without direct evidence of the specific pecuniary loss. The jury had presented to them evidence of the parents of the deceased, their position in life, the occupation of the father, the condition of his health, the age of his son, his intelligence, his ability to earn money, etc. ; and it was their province, from this evidence and their general knowledge, to form an estimate of the damages with reference to the pecuniary injuries, present and prospective, resulting to the next of kin. It is impracticable to furnish direct evidence of the specific loss occasioned by the death of a child ; and to hold that without such positive proof a plaintiff could not succeed, would, in effect, defeat any substantial recovery. *Ihl v. Railroad Co.*, 47 N. Y. 317 ; *City of Chicago v. Scholten*, 75 Ill. 469 ; *Railroad Co. v. Barker*, 39 Ark. 491, and cases cited ; *Nagel v. Railway Co.*, 75 Mo. 653 ; s. c., 10 Am. & Eng. R. R. Cas. 702 ; *City of Chicago v. Hesing*, 83 Ill. 204 ; *Railroad Co. v. Richards*, 8 Kan. 101.

In the case of *Waite v. Teeters*, *ante*, 146 (recently decided), the instruction that the jury might use their own knowledge in determining the value of the corn was held to be misleading ; but in that case proof could easily have been offered of the value of the corn standing in the field, although it was distant from the railroad and market.

In *Railroad Co. v. Brown*, 26 Kan. 443 ; s. c., 6 Am. & Eng. R. R. Cas. 228, referred to as controlling this case, the deceased was twenty-five years of age, with a widowed mother and a sister who lived off the property they owned. In that case the testimony showed that the deceased had been worth nothing to his mother up to the time of his death, and it was well said "that, judging the future by the past, the life of the deceased was one which would have been of little value." In that case the deceased had lived long enough to establish that there could be no reasonable expectation of pecuniary advantage to the mother from his life.

In *Railroad Co. v. Weber*, 33 Kan. 543 ; s. c., 21 Am. & Eng. R. R. Cas. 418, also referred to as an authority, the jury found specially that the deceased was in the habit of drinking intoxicating liquors to excess for years before his death, and that his life was of no pecuniary value to his next of kin. In such a case, clearly nothing but nominal damages could be recovered. In

that case the principal contention was, that, as no actual damage or pecuniary loss was sustained by the next of kin, not even nominal damages could be recovered.

It is next claimed that the trial court erred in refusing to require the jury to answer certain special questions. All of the questions which the railway company desired to submit, with one exception, were inquiries as to how much a year the deceased would have contributed to the support of his father if he had lived, and the items thereof. In refusing to submit these questions, we think there was no material error. Much that has already been said concerning the damages to be assessed by the jury in such a case as this applies with peculiar force to the questions proposed. As the jury may compensate for present and prospective pecuniary injuries, and as the amount of these injuries must be left largely to their discretion, it would be impossible, with any reasonable accuracy, to have answered the questions. The value of the probable future services of the deceased to his next of kin during his minority must, in the nature of things, have been largely a matter of conjecture. It would be impossible to itemize the value of such probable future services.

"In the very nature of things, it seems to us an exact and uniform rule for measuring the value of the life taken away to the survivors is impossible. The elements which go to make up the value are personal to each case. All that can well be done is to say that the jury may take into consideration all the matters which go to make the life taken away of pecuniary value to the survivors, and, limited by the amount named in the statute, award compensation therefor. To go beyond this, and lay down an arbitrary rule for valuing the life of the deceased, — a rule applicable to all cases alike, — however satisfactory it might be because of its uniformity, would in many instances operate to defeat the accomplishment of the wholesome purposes sought by this Act. It was well said by Mr. Justice Nelson in the case of *Railroad Co. v. Barron*, 5 Wall. 90, that 'the damages must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case.'"
Railway Co. v. Cutter, 19 Kan. 83.

As to the question whether the deceased knew it was wrong to play upon the turn-table, an answer either way would not have affected the case. He might have known that it was wrong to trespass upon the property of the railway company, and yet have had no knowledge that the use of the turn-table was dangerous or even unsafe. If the company had presented the inquiry whether the deceased knew that it was dangerous or unsafe to play upon the

Same. Itemizing value of future services.

Knowledge of deceased of danger.

turn-table, a wholly different question would be before us for determination.

Further complaint is made that the damages are grossly excessive. We cannot say that the judgment, as rendered, is so excessive as to require this court to reverse the judgment. In Illinois, where the action was for the death of a boy between six and seven years of age, a verdict for ^{Damages not excessive.} \$2,000 was sustained. *Railroad Co. v. Becker*, 84 Ill. 483. In Tennessee a verdict for \$3,000 for the death of an infant child eighteen months old was sustained. *Railroad Co. v. Connor*, 9 Heisk. 20. In New York, where the deceased was between six and seven years of age, the jury awarded \$1,300 as damages for loss of probable future services, and the court refused to set aside the verdict as excessive. In that case there was no proof that the child was earning any thing at the time she was killed. *Oldfield v. Railway Co.*, 3 E. D. Smith, 103. In another case in the same State, where the action was for the death of a boy eight years of age, a verdict of \$2,500 was rendered, and the Supreme Court would not interfere. *McGovern v. Railway Co.*, 67 N. Y. 417. In another case in the same State a girl of six was struck by a locomotive and killed. The jury awarded \$5,000 damages. The court was asked to set aside the verdict as excessive, but declined to interfere, saying, that, as a matter of law, it was impossible to say that the actual pecuniary injuries resulting from the death of the infant might not be that amount. 15 Cent. Law J. 286.

The judgment of the District Court will be affirmed ; all the justices concurring.

Injury to Children playing upon Turn-Tables. — See note, 25 Am. & Eng. R. R. Cas. 543; *Kalsti v. Minneapolis, etc., R. Co.*, 19 Ib. 140; *Nagel v. Missouri Pac. R. Co.*, 19 Ib. 702; *Evansich v. Gulf, etc., R. Co.*, 6 Ib. 182.

As to Excessive Damages for causing Death of Minor. — See *Penn. Co. v. Lilly*, 4 Am. & Eng. R. R. Cas. 540; *Nehrbas v. Central Pac. R. Co.*, 14 Ib. 670; *Hoppe v. Chicago, etc., R. Co.*, 19 Ib. 74.

Assessment of Damages in Actions for Death of Minor Child. — See *Penna. Co. v. Lilly*, 4 Am. & Eng. R. R. Cas. 540; *St. Louis, etc., R. Co. v. Freeman*, 4 Ib. 608; *Rains v. St. Louis, etc., R. Co.*, 5 Ib. 610; *Lehigh Iron Co. v. Rupp*, 7 Ib. 25; *Nagel v. Missouri Pac. R. Co.*, 10 Ib. 702; *Gulf, etc., R. Co. v. Levy*, 12 Ib. 90; *Nehrbas v. Central Pac. R. Co.*, 14 Ib. 670; *Little Rock, etc., R. Co. v. Barker*, 19 Ib. 195; *Johnson v. Chicago & N. W. R. Co.*, 25 Ib. 358; *Ft. Wayne, etc., R. Co. v. Byerle*, 28 Ib. 306.

NORTH HUDSON COUNTY R. Co.

v.

ISLEY.

(New Jersey Court of Errors and Appeals.)

Personal Injuries — Negligence — Conflict of Evidence. — Where, in an action to recover damages for personal injuries, it appears that plaintiff's wagon and the defendant's horse-car were approaching each other on the same track, and several witnesses testified that the car was being driven at an unusual rate of speed, and that the car-driver was not looking at the track, but had his head turned away, and that he was so inattentive, that although one witness called to him, and his hand was on the brake, he made no effort whatever to check the speed of the car, and the driver contradicted such testimony, the case ought to be left to the jury upon the conflicting evidence.

Street-Railway — Rights of Company — Other Vehicles on Track. — Street-cars have a right to pass upon a track without hindrance; but when the track is not used for the passage of the car, other vehicles may use it in travelling along the street; and when the driver of such a vehicle meets an approaching car, he is bound to remove his vehicle from the track in time to give free passage to the car. But what will be deemed due diligence in so removing his vehicle is a question for the jury, to be determined upon the circumstances of each particular case.

ERROR to the Supreme Court of New Jersey.

Action by Edward Isley against the North Hudson Railway Company, to recover damages for personal injuries. Verdict and judgment for plaintiff. The defendant brings the present writ of error to review a judgment of the Supreme Court affirming the decision of the trial court. The opinion states the case.

J. C. Besson for plaintiff in error.

M. T. Newbold for defendant in error.

MAGIE, J. — This action was brought to recover damages for injuries received by Isley in a collision between the wagon in which he was riding and a horse-car of the railway company. The assignment of errors questions the correctness of the judgment in favor of Isley, on the ground that there was not sufficient evidence to justify the submission of his claim to the jury. On the argument it has been contended that the trial judge ought to have nonsuited Isley, or to have directed a verdict against him and in favor of the company.

This contention is first made upon the ground that the evidence did not disclose any negligence on the part of the company. Several witnesses, however, testified that the car was being driven

at an unusual rate of speed. One witness who had opportunity to observe, further testified that the car-driver was not looking at the track, but had his head turned as if talking to a man on the other side, and was so inattentive, that although the witness called to him, and his hand was on the brake, he made no effort whatever to check the speed of the car. The driver contradicted these witnesses, and testified to a state of facts quite inconsistent with their story.

But on this conflicting evidence it is obvious that there was no warrant for withdrawing the case from the jury. On the contrary, it was necessary to submit to them the determination of the question of the driver's conduct; for if it was what Isley's witnesses testified, he was guilty of negligence in the management of his car, and that negligence was imputable to the company.

Case was
for jury.

The contention of the plaintiff in error is next urged, on the ground that the evidence that Isley contributed to his injuries by his own negligence was so strong as to require the trial judge to nonsuit or to direct a verdict against him. The insistent is, that if Isley's wagon and the horse-car were approaching each other on the same track (as Isley and his witnesses testified), he did not exercise due diligence and care in avoiding a collision.

There is no dispute over the legal rules applicable to the case. They are well settled. The cars of this sort have a right to pass upon their track without hindrance. When the track is not used for the passage of a car, other vehicles may use it in travelling along the street. When the driver of such a vehicle meets an approaching car, he is bound to remove his vehicle from the track in time to give free passage to the car.

Other vehicles
on street-car
track.

But it is obvious that it cannot be settled by any arbitrary rule when a driver should begin to turn from the track to give free passage to an approaching car. Each case must depend on its circumstances, such as the speed with which the car is approaching, the weight and character of the vehicle, and the ease or difficulty of turning it from the track, and other similar circumstances. Upon these the driver must exercise a reasonable judgment, and do what a prudent man, diligent to permit free passage to the car, would do.

A careful examination of the evidence has convinced me that the trial judge was correct in submitting to the jury the question whether or not Isley failed to exercise such diligence and care as was required of him. The distance at which he commenced to turn from the track was variously estimated by the witnesses. Taking the lowest estimate fixed, it was still a question whether his conduct was

Contributory
negligence of
plaintiff.

not that of a reasonably prudent man. One of the witnesses testified (without objection) that he "supposed we had lots of time to turn out."

It further appeared, that when Isley first saw the car it was stationary at the terminus of the road. While it remained stationary he could continue to drive upon the track. His duty to remove his vehicle from the track did not arise until the car started, or gave indications that it was about to start. Isley testified, that, as soon as he saw that it was in motion, he began to turn from the track. On cross-examination he made some statements which are claimed to be inconsistent with and contradictory of this statement. But there was nothing to justify the judge in directing the jury to disregard his evidence. On the contrary, if his evidence on this point stood alone, the question of the credit to be given to his statement was for the jury. But his statement was not uncorroborated. Westcott, who sat beside Isley, also testified that when the car began to move, Isley began to turn from the track; and his testimony seems not to have been shaken on cross-examination.

For these reasons I think the trial judge properly refused to nonsuit, and to direct a verdict for the company; and I shall vote to affirm the judgment below.

The case of North Hudson County Railway Co. *v.* Edward Isley and wife was argued with the above, and the same points were presented. For the reasons above given, I shall also vote to affirm that judgment.

For affirmance — Depue, Dixon, Magie, Parker, Clement, Cole, McGregor — 7.

For reversal — The Chancellor, Chief Justice, Reed, Scudder, Paterson — 5.

Use of Street-Car Tracks by other Vehicles. — See *Wood v. Detroit City St. R. Co.*, 19 Ib. 129, note 131; *Citizens' Coach Co. v. Camden H. R. Co.*, 1 Ib. 190; *Cottam v. Guest*, 1 Ib. 574.

HAYS

v.

GAINESVILLE STREET R. Co.

(Texas Supreme Court, May 1, 1888.)

Street Railway — Personal Injuries — Negligence — Instruction. — In an action against a street railway company to recover damages for personal injuries sustained by plaintiff through the defendant's negligence, an instruction that the plaintiff is entitled to recover if he was injured through the carelessness of defendant's car-driver, or by the wilful or intentional act of such driver, is erroneous, as indicating that the term "negligence" is to be considered as synonymous with an intention on the driver's part to inflict an injury on plaintiff.

Same — Pleading — "Gross Negligence." — An averment in a complaint that the plaintiff was injured through defendant's "gross negligence," will not limit plaintiff's right of recovery (if otherwise entitled) to an injury inflicted by the wilful or intentional act of another; but he may recover for any lesser degree of negligence.

Same — Slight Negligence — Instruction. — An instruction which will preclude a plaintiff from recovery for personal injuries unless he exercised prudence and foresight to avoid injury, is erroneous, there being no rule of law which requires him to use more than ordinary caution to shield himself from the consequences of contributory negligence.

Same — Contributory Negligence — Right to Recover. — A plaintiff may recover for personal injuries, even though he has been guilty of contributory negligence, if defendant could have avoided injuring him, after discovering his peril, by the use of such means as a prudent and careful man would have employed under the same circumstances; defendant's want of ordinary care being the proximate cause in such circumstances.

Same — Unskilful Employee. — In an action against a street railway company for damages for personal injuries sustained through the negligence of a driver in its employ, an instruction that if, by the failure of defendant to employ skilful and prudent drivers, any one is injured, the defendant is liable, but that the fact that a driver might have been careless or imprudent at other times would not render the company liable, unless, on the occasion of the injury sued for, such driver was careless, reckless, or imprudent, is argumentative and improper.

Same — Personal Injuries — Evidence — Competency. — In an action by a boy against a street railway company for damages for personal injuries, evidence that other boys than plaintiff had been in the habit of jumping on the cars and rocking, and scaring the mules, is inadmissible.

Same — Application of Brake — Evidence. — In such action, if there is evidence before the jury tending to show that when the brakes are applied, a car-wheel will not revolve, but will slide along the ground, the boot worn by plaintiff at the time of the injury is admissible for the purpose of showing by the indentations upon it that the car-wheel ran over plaintiff's foot, and that the brake was not applied.

APPEAL from Cook County District Court.

Action by an infant, by his next friend, to recover damages for

personal injuries. Appeal by plaintiff from verdict and judgment for defendant.

The opinion states the case.

E. A. Blanton and Hill & Hill for appellant.

Patter & Hughes for appellee.

MALTBIE, J. — Reese A. Hays, the appellant, a boy eleven years old, was seriously injured by reason of the wheels of one of the cars of the Gainesville Street Railway running over his foot, under the following circumstances: Appellant, in company with a number of other boys, was returning from school along North Dixon Street, in the city of Gainesville, over which appellee had constructed its street railway, and was engaged in operating its cars. Hays was in the street on the west side of appellee's track, going in the direction of his home, which was south-east of the track. At the same time, one of appellee's cars was approaching from the north, drawn by a mule, going in a slow trot. Hays and a boy named Purdy were playing; the former running along, and within a few feet of the street-car track, closely pursued by Purdy, who was about to overtake him, when Hays turned suddenly to the left, colliding with the mule drawing the car, striking the mule about the shoulders, causing him to shy, which caused Hays to fall. The mule moved on, drawing the car over Hays's foot and ankle, fracturing the bone, and causing much pain and suffering. It was shown that from the shoulders of the mule to the front wheel of the car is a distance of 11 or 12 feet; and there was evidence tending to show, that, by applying the brakes attached to this car, it could have been stopped within a space of 6 feet. There was also evidence tending to show that the driver was careless and incompetent, and that he struck the mule a sharp blow with his whip just as appellant fell to the ground, though all these facts were disputed. The ordinances of the city of Gainesville, under authority of which appellee's road was constructed, require that all drivers of street-cars shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or running towards it; and, on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible, and that each driver shall have a whistle, and, on the approach of danger to any person, animal, or vehicle, shall give an alarm. The collision occurred near the point where the appellant was in the habit of crossing the track in going to and returning from his home. He did not see or hear the car, though he could have done so, had he listened or looked. The reason that he did not see the mule in time to avoid the collision was, that he was looking back at his pursuer.

The trial resulted in a verdict and judgment for the appellee. Alleged errors in the charge of the court and in admission and rejection of evidence are relied on for a reversal of the judgment. The controlling question in this, as in almost all other cases of personal injury, is as to which party is guilty of negligence contributing proximately to the injury.

Negligence is a relative term; and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances usually impose. The degree is not the same in all cases, but may vary according to the danger involved in the want of vigilance. **Negligence a relative term. Illustration.** Cooley, Torts, 630. To illustrate, it would involve little or no want of care to cross a road or street on foot used exclusively for ordinary travel, without looking either way for persons on horseback or in vehicles, because usually there is but little danger in so doing; while it would be gross negligence to cross a railroad track over which many trains of cars are accustomed to pass every hour in the day, without using the utmost vigilance and circumspection. In determining whether it is an act of negligence to go upon a street-car track, the frequency of the passage of cars, their usual rate of speed, whether many people are accustomed to cross at that particular place, whether there is a duty imposed by law upon the drivers to keep a lookout and give warning of approaching danger, and the like circumstances, may be taken into consideration. In the present instance the ordinance under which appellee was incorporated made it the duty of the car-driver to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger; and a failure to perform this duty would of itself be an act of negligence. But the District Court, for the purposes of the trial, considered the term "negligence," as applied to appellee, as synonymous with an intention on its part to inflict an injury on appellant. In the second paragraph of the charge the jury are told that if plaintiff was injured through the carelessness of the driver of defendant, or by the wilful or intentional act of such driver, as charged in plaintiff's petition, to find in his favor. The allegations on the subject, briefly stated, are to the effect that the injury complained of was inflicted through the negligence of defendant, and do not authorize the charge. And, again, after giving a detailed statement of the acts leading to the injury, the petition charges that it was inflicted through the gross negligence of defendant. The term "gross negligence" includes all lesser degrees of negligence; and a charge in a petition that an act was done through gross negligence would not limit the right of

Instruction as to negligence of defendant held erroneous.

Same. Gross negligence.

recovery, if otherwise entitled, to an injury inflicted by the wilful or intentional act of another. Negligence is of a negative character, and implies a want of care. In order for an act to be negligent, it is never necessary that it should be done through design, though it is said that an act may be so grossly negligent that it may be presumed to have been wilfully or intentionally done. The sixth paragraph of the charge is as follows: "Although you may believe from the evidence that the driver of said street-car

**Recovery not-
withstanding
contributory
negligence.**

was guilty of negligence which contributed to the injury in question, still, if you further find from the evidence that the plaintiff was also guilty of negligence which directly contributed to the injury, then the plaintiff cannot recover in this suit, unless the jury further find from the evidence that the negligence of the driver of said street-car was malicious and wilful or wantonly reckless, showing an utter disregard for plaintiff, and that the negligence of plaintiff was but slight, as will hereinafter be explained to you." In seventh paragraph of the charge the jury is again told, that, if plaintiff was guilty of contributory negligence, he can not recover, unless the injury was caused by the wilful, wanton, or malicious act of the driver. In eighth paragraph the court charges, "By the term 'slight negligence,' as used in sixth sec-

**Same. Slight
negligence.**

tion of this charge, is meant in the absence of that degree of care and vigilance which persons of extraordinary vigilance and foresight are accustomed to use under similar circumstances." The effect of these instructions was to preclude plaintiff from a recovery unless he exercised extraordinary prudence and foresight to avoid the injury. If the injury was the result of the negligence of appellee, there is no rule of law that requires that appellant should have used more than ordinary caution to shield himself from the consequences of the contributory negligence. We are also of the opinion that the proposition announced in paragraph 6 and repeated in paragraph 7 of the charge, to the effect, that, if plaintiff was guilty of contributory negligence, he cannot recover,

**Same. Wilfully
inflicting
injury.**

unless the car-driver wilfully or intentionally inflicted the injury upon him, should not have been given except upon the theory that the driver failed to discover plaintiff's peril in time to avoid injuring him by the use of such means as a prudent and careful man would have employed under the same circumstances; for, if the driver could have then avoided the injury after discovering plaintiff's peril, his want of ordinary care was the proximate cause of it, and defendant would be liable for damages. The reason why a person who is guilty of negligence contributing to his own injury cannot recover, is because the policy of the law will not ordi-

narily permit one to recover who is himself at fault ; but although the negligence of such person may contribute to his own injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand, to have prevented the injury, the law considers the failure to use such means as the immediate cause, and will permit a recovery, notwithstanding the injured party was guilty of contributory negligence. *Railway Co. v. Weisen*, 65 Tex. 447. On account of the prominence given in the charge to the doctrine that appellant could not recover if guilty of contributory negligence, unless the injury was inflicted wilfully, wantonly, or maliciously, we do not think it likely that the jury understood paragraph 10 to be a qualification of the doctrine before announced and emphasized, though doubtless so intended by the court. We think that when it becomes necessary, in a charge to a jury, that a doctrine given should be limited or qualified, the qualification should follow the main proposition as nearly as convenient, in order to prevent any confusion in the mind of the jury. If, taking into consideration the age of appellant, and all of the other facts and circumstances of this case, he was guilty of contributory negligence in going on to appellee's track, — and of this we express no opinion, — we do not think appellee would be liable if the driver did not in fact discover appellant in time to have prevented him from being run over, and such failure was no more than ordinary negligence.

In paragraph 13, the court, after charging that if by the failure of the street-car company to employ skilful and prudent drivers any one is injured, that the company is liable, further charges that the fact that a driver might have been at other times careless or imprudent would not render the company liable in this action, unless, on the occasion of the injury sued for, such driver was careless, reckless, or imprudent. While the proposition embraced in this charge may be sound logic, still it is argumentative, and improper to be given in charge to a jury by a court. The evidence was conflicting as to whether the driver was negligent on this occasion ; and his negligence on former occasions, if such was proven, was a circumstance to be considered by the jury with the other evidence in the case in determining whether he was negligent or not on the present occasion. Parties are, under the laws of this State, entitled to have juries consider all evidence submitted to them, without any suggestion or comments whatever from the court. The statute contemplates that such legal propositions, and such only, as are applicable to the facts of the case, should be submitted by the court to the jury in language and terms suited to

Unskilful
employee.
Instruction
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their capacity; and the jury must be left to determine the facts, unbiassed by any intimation of the court as to the weight of the evidence.

A number of rulings in reference to the admission and rejection of testimony are assigned as erroneous, but it is not deemed necessary to notice any except two.

Evidence as to acts of other boys. The court, over an objection that the evidence was immaterial, and did not confine the investigation to the occasion of the injury, permitted the defendant to prove that other boys than the plaintiff had been in the habit of jumping on the cars and rocking, and scaring the mules. The objection should have been sustained. The testimony was clearly inadmissible, and was calculated to distract the attention of the jury from the true issues of the case. During the progress of the trial, plaintiff offered in evidence the boot worn by him at the time he was injured, for the purpose, as stated by counsel to the court, of exhibiting the indentations made thereon for the inspection of the jury, as tending to show the car-wheel ran over the plaintiff's foot, and that the brake was not applied; there being other evidence before the jury tending to show, when the brakes are applied, a car-wheel will not revolve, but will slide along the ground. The boot and indentations were excluded on an objection for immateriality. In this there was error. Physical facts are always admissible; and, when the object itself can be brought into court and exhibited, it is more satisfactory than a description of it by witnesses that have inspected it outside of court.

Application of brake. Boot in evidence.

For the errors indicated, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. — Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

Recovery notwithstanding Contributory Negligence. — See generally *Zimmerman v. Hannibal, etc.*, R. Co., 2 Am. & Eng. R. R. Cas. 191; *Price v. St. Louis, etc.*, R. Co., 3 Ib. 365; *St. Louis, etc., R. Co. v. Freeman*, 4 Ib. 608; *Behrens v. Chicago, etc.*, R. Co., 6 Ib. 222; *Rains v. St. Louis, etc.*, R. Co., 5 Ib. 610; *Little Rock, etc., R. Co. v. Pankhurst*, 5 Ib. 635; *Colorado Cent. R. Co. v. Holmes*, 8 Ib. 410; *Fowler v. Baltimore, etc.*, R. Co., 8 Ib. 480; *Chicago, etc., R. Co. v. Johnson*, 8 Ib. 225; *Swigert v. Hannibal, etc.*, R. Co., 9 Ib. 322; *Yarnell v. St. Louis, etc.*, R. Co., 10 Ib. 726; *Louisville, etc., R. Co. v. Fleming*, 18 Ib. 347; *East Tenn., etc., R. Co. v. Fain*, 19 Ib. 102; *Schoville v. Hannibal & St. Jo. R. Co.*, 22 Ib. 534; *Ivens v. Cincinnati, etc.*, R. Co., 23 Ib. 258; *Welty v. Indianapolis & V. R. Co.*, 24 Ib. 371; *Rigler v. Railroad Co.*, 26 Ib. 386; *South Covington, etc., R. Co. v. Ware*, 27 Ib. 206; *Baltimore & O. R. Co. v. Kean*, 28 Ib. 250; *Lehigh V. R. Co. v. Greiner*, 28 Ib. 397; *Louisville, etc., R. Co. v. Yniestra*, 29 Ib. 297.

DONNELLY

v

BROOKLYN CITY R. Co.

(New York Court of Appeals, March 13, 1888.)

Street Railroad — Person on Track — Contributory Negligence. — In an action against a railroad company to recover damages for personal injuries, it appeared that plaintiff, with a companion, drove along an avenue on which there were two railroad tracks, upon which were run trains of cars drawn by dummy engines. The tracks were laid in the middle of the avenue, and there was an ordinary dirt road on either side of sufficient width for the passage of vehicles. Plaintiff and his companion had been on the right-hand railroad track, when, hearing a wagon approaching which they judged to be loaded, plaintiff's companion, who was driving, turned to the left hand, and drove upon the other track. They travelled on that track between 100 and 150 feet when they heard a dummy engine approaching. When they first heard the engine, it was about 75 feet from the place where they were, but they did not see the headlight until it was about 50 feet off. Plaintiff did nothing except sit upon the wagon and shout twice to the engineer to hold up. *Held*, that plaintiff and his companion were so evidently dilatory in endeavoring to avoid the impending danger, that a nonsuit ought to have been ordered.¹

EDWARD DONNELLY brought an action against the Brooklyn City Railroad Company, for personal injuries sustained by him while travelling along a street upon which defendant's tracks were laid. There was a verdict and judgment for the plaintiff. The defendant appeals. The opinion states the facts.

Samuel D. Morris for appellant.

Charles J. Patterson for respondent.

GRAY, J. — The facts proved on the trial of this action did not warrant the submission of the case to the jury. It was shown on the plaintiff's part that he was chargeable with neglect to act in such manner as to avoid the danger. Facts.

The plaintiff, with one McNally, had driven in from Fort Hamilton, where they were employed, to the city of Brooklyn, in the evening, in a wagon drawn by one horse, with a load of fish for market. They set out to return about midnight, and took the route of an avenue on which were two tracks of the defendant, upon which were run, either way, trains of cars drawn by dummy engines. These tracks were laid in the middle of the avenue,

¹ INJURIES TO TRESPASSER ON TRACK. — See *ante*, *Kennedy v. Denver, S. P. & P. R. Co.*, 40, and note 47; *Guenther v. St. Louis, I. M. & S. R. Co.*, 47, and note 55-59.

and on either side was an ordinary dirt road of sufficient width for the passage of vehicles. McNally was driving, and plaintiff was sitting by his side. They had been on the right-hand railroad track, when, hearing a wagon approaching which they judged to be loaded, they turned to the left hand, and drove upon the other track used by trains going towards Brooklyn. They had not been long there when they heard and saw coming towards them in the distance a dummy engine. We give the plaintiff's description of how they knew of the approach of the engine. On his direct examination he was asked, after stating how they came to take the other track, and then endeavored to get back on their former track: "*Question.* How far did he" [referring to McNally] "go that way, trying to pull himself out, — to the right? *Answer.* He must have gone somewhere, I think, about 50 feet nearly: didn't notice any thing then; I noticed the railroad car when it came pretty near. *Q.* What did you notice? *A.* The light of the dummy, the torchlight upon the boiler; whatever you call it. *Q.* Was your attention attracted to the dummy by hearing it, or seeing it? *A.* I heard the noise, then watched and saw the light behind the boiler; I first heard the noise. *Q.* Where did you hear the noise, about? *A.* Coming over a gutter, — the iron grating in the road, — an iron bridge that covers an opening in the road; that iron bridge is 75 feet from where I was when I first heard it. When I heard that noise, I did nothing; I looked, and saw a light behind the boiler." Plaintiff further testified that he did not see the headlight until it was about 50 feet off, and that it was dim. He said, "When the train was going over that 75 feet, I did nothing except to sit on the wagon and shout twice to the engineer to hold up." Plaintiff thought that the train was going about five miles an hour; though how, upon so dark a night, and as he describes the events, he could form any possible or reliable opinion as to the speed of the train, it is difficult to comprehend. The horse and engine collided; the horse was killed, and plaintiff was thrown out, and received his injuries. The force of the collision was such as to cause the shaft of the wagon to penetrate the engine's water-tank. Plaintiff further, upon his counsel's examination, testified, after saying that no whistle was blown nor bell rung on the train: "*Question.* When did you listen for it? *Answer.* The whole way to the city line. I was listening, because I was expecting to meet it somewhere about there, — that part." He also says, when he heard the other wagon coming he told McNally he had "better turn out;" but he does not appear to have made any objection to his turning upon the track on which he tells us "he was expecting to meet" trains. He "was acquainted with that avenue; had been in the habit of going along Third Avenue a good many

years." He "used to drive a car, and knew which track the cars run on in coming to Brooklyn, and was expecting a train along there."

Plaintiff's narrative of what happened, and from which we have extracted the foregoing facts, was corroborated by McNally. From his evidence it appears that he turned out for the wagon, because, from the sound, he judged it to be loaded; that they proceeded on the other road between 100 and 150 feet before his attention was attracted to any engine; that he had gone so far on the left-hand track because his wheels had got jammed. McNally had been driving over the avenue several times a month for fifteen years. He says, "I knew the train was coming, but I did not expect her at that portion,—I did not expect to meet the train there;" and he saw the dummy before he saw any light. They were on a down grade, and turned out for the approaching wagon, because it was usual at that portion of the route to give the right of way to incoming wagons. His excuse for not pulling out upon the side of the road was, that it was a sandy road, and the boughs of the trees would interfere with his load. That load consisted of empty fish-boxes. The tree-branches, he said, arched over the road, but hung lower on the sides.

With this proof we fail to see that there was any case made out for plaintiff. Reference to defendant's proof only makes it clearer that there was no case made out for submission to the jury. The plaintiff and McNally were driving on the tracks, late, upon what they say was a dark night; at a place in the avenue where they knew a train was about due; with space of road on either side of the tracks to drive upon; and they deliberately turned upon the track on which they expected a train to approach. They were both well acquainted with the locality and with the direction taken by trains. The fact that the side of the avenue was sandy or heavy does not furnish a reasonable excuse, for it was a down grade, and their wagon no longer had its load. The low-hanging boughs, even if, as they say, likely to interfere with driving, were preferable as a risk to that of meeting the expected train. After they had gone on the other track, they heard and saw the approaching train, but were evidently dilatory in endeavoring to avoid the impending danger. The conduct of plaintiff and McNally seems strange in view of all the facts, and difficult to account for if they had entire possession of their reasoning faculties.

**Negligence of
plaintiff bars
recovery.**

It is not necessary to hold that the defendant had an exclusive right to the use of the street. It had the paramount right to the use of the street for their corporate purposes. Its tracks were

lawfully there, and to its trains belonged the right of way. It was incumbent upon persons who chose to drive upon the tracks, in preference to using the side of the road, to be cautious, and to exercise ordinary care and prudence. In such respect plaintiff and his companion were lacking, and the want of prudence is especially noticeable in view of the facts and of the knowledge they testified to possessing. We do not think the dimness of the headlight, or the failure to blow a whistle or to ring a bell, under the circumstances, constitutes negligence on the part of the defendant. The headlight was, as a fact, lit, and was seen by plaintiff. We have no proof of any legal requirement under which the bell should be rung or the whistle blown continuously upon night-trips of defendant's engines, and there was no crossing of streets at that part of the avenue to make such an indication of the approach of the engine necessary. Plaintiff, in going upon the railroad track when knowing of the approach of a train, and having notice in addition of its coming a sufficient time to avoid any injury from it, could not, as a matter of law, recover, although the railroad company may have been also negligent, or have neglected some requirement. Where negligence is the issue, it must be an unmixed case. *Dascomb v. Railroad Co.*, 27 Barb. 227. A verdict in favor of the plaintiff would have been set aside as against the evidence, and in such a case it is the duty of the court to nonsuit. *Gonzales v. Railroad Co.*, 38 N. Y. 440; *Nuendorff v. Insurance Co.*, 69 N. Y. 393. We think the plaintiff was chargeable with the neglect of his comrade. He was conscious of the danger, and apparently made no objection or effort to avoid it. He was engaged in a common employment with McNally. He had full control of his own actions, and, though on the safe track, did not object when, after telling McNally to turn out, they turned upon the dangerous track. No decision cited conflicts with our view. The present case differs from that where a person accepts a gratuitous ride, as in the cases of *Robinson v. Railroad Co.*, 66 N. Y. 11; *Dyer v. Railway Co.*, 71 N. Y. 228; *Masterson v. Railroad Co.*, 84 N. Y. 247; s. c., 3 Am. & Eng. R. R. Cas. 408.

After a careful consideration of this case, we think, in view of the knowledge possessed by plaintiff, and of his conduct at the time, that there was contributory negligence, and he was not entitled to recover. The judgment should be reversed, and a new trial ordered, costs to abide the event.

Ruger, C. J., Earl and Finch, JJ., concur. Andrews, Danforth, and Peckham, JJ., dissent.

TEMPLIN *et al.**v.***CHICAGO, BURLINGTON, & PACIFIC R. Co. *et al.****(Iowa Supreme Court.)*

Construction of Road — Mechanic's Lien — Sub-contractors. — Where one railroad company sells its road to another, and the first company thereafter enters into a contract with a third party for the construction of the track, such third party cannot, under the Iowa statute, acquire a lien for material and labor as against the company purchasing, unless they are sub-contractors, there being no privity of contract between him and the purchasing company.

Same — Sale of Road before Construction. — When one railroad company sells its road to another before completion, and, in doing so, enters into a contract to complete it, a third person with whom it enters into a contract for work in connection with such completion stands on the relation of a sub-contractor to the purchasing company, and is entitled to a lien for labor and material only in the event of his complying with the statute providing for sub-contractors.

Same — Power of President — Contract. — The president of a railroad company has no power, merely by virtue of his office, to bind the company by a contract for the construction of its railroad; particularly is this true when the same is already under contract by the board of directors.

APPEAL from Henry County Circuit Court.

Action to establish and foreclose an alleged lien for material supplied and labor done in the construction of a railroad. Appeal by defendants from a decree in plaintiff's favor.

The facts are stated in the opinion.

R. Ambler, J. H. Blair, and A. C. Daly for appellants.

Woolson & Babb for appellees.

ADAMS, C. J. — The plaintiffs performed labor in laying a part of a track, and in doing other work, on a certain railroad in Iowa. They received payment in part, and bring this action to recover of the defendant the Chicago, Burlington, & Pacific Railroad Company for an alleged balance, and to establish the same as a lien upon the road. The parties are not agreed as to who contracted with the plaintiffs to do the work, nor as to who owned the road at the time, nor as to who received the benefit of the work. The plaintiffs claim that the road was owned by the defendant the Chicago, Burlington, & Pacific Railroad Company, and that that company contracted with them to do the work in question, and received the benefit of the work.

Facts.

The company, in its answer, denies all three of these propositions. Its counsel, in their argument, contend that the evidence shows that the road was owned by the defendant the Central Iowa Railway Company, and that the work in question was done for the Trunk Line Construction Company, a corporation organized under the laws of Connecticut, and engaged in constructing railroads. The construction company is not made defendant.

It is conceded that the road was owned at one time by the defendant the Chicago, Burlington, & Pacific Railroad Company; but we think that the evidence shows, that, before the contract sued upon was entered into, that company sold and conveyed the road by a duly recorded deed to the defendant the Central Iowa Railway Company. The court decreed a mechanic's lien against the latter company, but there is no pretence that the plaintiffs had any contract with that company. The contract not having been made with the company then owning the road, the plaintiffs could not acquire a lien as against that company unless they were sub-contractors. But the action is not brought upon that theory, nor is there any pretence that the requisite steps were taken to establish a sub-contractor's lien. The plaintiffs' claim is, that they were original contractors, by virtue of a contract with the Chicago, Burlington, & Pacific Railroad Company, and that they are entitled to a lien notwithstanding the fact that that company had already sold and conveyed its road before their contract was entered into. At the time of the sale of the road it was only partially constructed, and the seller, the Chicago, Burlington, & Pacific Railroad Company, entered into a contract with the purchaser binding itself to construct the remainder; and it is contended by the plaintiffs that the seller agreed to complete the road for the consideration agreed upon in the sale. But such fact would not give the plaintiffs a contract with the owner of the road; and it is only under a contract with the owner that the plaintiffs, under the statute, can be allowed a lien as original contractors. It was the Central Iowa Railway Company's right to proceed and settle for the road with the only party with whom it had contracted, unless labor and materials had been furnished under a sub-contract, and the requisite steps had been taken to obtain a sub-contractor's lien. If, after the sale and conveyance, the Chicago, Burlington, & Pacific Railroad Company was under contract to complete the road, its relation to the road was substantially the same as if it had never owned it. The company was virtually a contractor; and persons working under it, by contract made subsequent to the sale, were virtually sub-contractors. To acquire a lien, the persons thus working should bring themselves within the statute providing for sub-contractors.

**Vendee
company a
contractor.
Sub-con-
tractor's lien.**

The defendants contend that the plaintiffs did not have a contract even with the company which once owned the road, but that their work was performed for the Trunk Line Construction Company, and that they have been paid for their work by that company, so far as they have been paid at all. The plaintiffs base their claim upon an alleged written contract, and that contract purports to be signed by one S. C. Cook, who was at the time the president of the Chicago, Burlington, & Pacific Railroad Company, and the contract purports to bind that company. It is undisputed, however, that the company had at the time a contract with the Trunk Line Construction Company to do all the work in the construction of the road, including the work in question, and that the railroad company paid, or arranged for the payment of, the construction company for the same. If the Chicago, Burlington, & Pacific Railroad Company must pay the plaintiffs for the work, it must pay for it twice. The evidence shows, that, at the time the plaintiffs' contract was made, Cook was not only president of the railroad company, but superintendent of a part of the work for the construction company. As such superintendent, he had occasion to employ some one to lay the rails and do some other work. He accordingly employed the plaintiffs. For some reason, however, not very apparent from the evidence, he executed the written contract in the name of the railroad company, by himself as president. He undoubtedly thought that the construction company would pay promptly for the work according to the contract, and that no one would be injured; and we surmise that he was led into his irregular action by the supposition that the plaintiffs would prefer a contract with the railroad company. But it is not important to inquire how the irregularity occurred; the important question is as to whether the railroad company is bound by Cook's action. It is shown by undisputed evidence that Cook had no express authority to make such a contract in behalf of the company. Witnesses so testify, and there was no evidence, by introduction of the articles of incorporation or otherwise, tending to show to the contrary. There is no evidence that he had been accustomed to make such contracts in behalf of the company from which his authority could be inferred. He had not been held out by the company in any way particularly, and the plaintiffs were not justified in inferring that he had larger powers than those which he actually possessed; nor do we understand the plaintiffs as contending that he had been so held out. Their contention is, as we understand them, that he had such power simply by virtue of his office as president, and without any express provision therefor in the articles of incorporation, or authorization by the board of directors.

Defendants'
contention.
Other facts.

We have, then, the question, Has a president of a railroad company the power, by virtue of his office simply, to let a contract in behalf of the company for the construction of its road, when the same is already under contract by the board of directors? No authority has been cited which so holds, and we conclude that such is not the law. In Taylor on Corporations, sect. 236, the author says, "*Virtute officii*, a president has very little authority to act for his corporation, and can bind it only by such contracts as plainly come within its most ordinary routine of business:" citing *Bank v. Hock*, 89 Pa. St. 324; *Blen v. Water Co.*, 20 Cal. 602; *Risley v. Railroad Co.*, 1 Hun, 202. In *Adriance v. Boone*, 52 Barb. 399, it was held that the officers of a corporation are special, and not general agents; that there is no grant of power in the name by which they are designated; that they have no power to bind the corporation, except within the limits prescribed by the charter and by-laws; and that persons dealing with such officers are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon it contained in the charter and by-laws.

In our opinion the decree must be reversed.

Power of President to bind Corporation. — The ordinary affairs of a corporation, such as custom has imposed upon, or necessity requires of, the president of a corporation, may be performed by him without express authority. *Blen v. Bear River & A. Water Co.*, 20 Cal. 602; *Mitchell v. Deeds*, 49 Ill. 416; *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297; *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59; *Adriance v. Boone*, 52 Barb. (N. Y.) 399; *Soper v. Buffalo & R. R. Co.*, 19 Barb. (N. Y.) 310; *Risley v. Indianapolis, B. & W. R. Co.*, 1 Hun (N. Y.), 202; *First Nat. Bank v. Hoch*, 89 Pa. St. 324. For any other acts he must have the authority of the board of directors. *Mitchell v. Deeds*, 49 Ill. 417; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116; *Titus v. Cairo & F. R. Co.*, 37 N. J. L. (8 Vr.) 98; *Leggett v. New Jersey Banking Co.*, 1 N. J. Eq. (1 Saxt.) 541; *Marine Bank v. Clements*, 3 Bosw. (N. Y.) 600; *Farmers' Bank of Buck's Co. v. McKee*, 2 Pa. St. 318; *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220.

The simple fact that a person is president does not of itself afford any evidence of his authority to bind the company by a contract. *Dabney v. Stevens*, 10 Abb. (N. Y.) Pr. N. S. 39; *Adriance v. Boone*, 52 Barb. (N. Y.) 390; *Risley v. Indianapolis, B. & W. R. Co.*, 1 Hun (N. Y.), 204.

Extension of Power by Charter. — The president's authority may, however, be extended by the charter or by-laws, or by the directors, so as to authorize him to do any act which is within the general scope of the corporation's business. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183; *Mitchell v. Deeds*, 49 Ill. 417; *Burrill v. Nahant Bank*, 43 Mass. (2 Metc.) 163; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 632; *Dabney v. Stevens*, 10 Abb. (N. Y.) Pr. N. S. 39.

Extension of Power by Usage. — Authority to make contracts which otherwise would be *ultra vires*, may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he was allowed, without interference, to conduct the affairs of the company. *Mount*

Sterling & J. T. R. Co. v. Looney, 1 Met. (Ky.) 550; *Northern Cent. R. Co. v. Bastian*, 15 Md. 494; *Kraft v. Freeman Pub. Co.*, 87 N. Y. 628; *Hoyt v. Thompson*, 5 N. Y. 320, 323; *Dabney v. Stevens*, 10 Abb. (N. Y.) Pr. N. S. 39; *Elwell v. Dodge*, 33 Barb. (N. Y.) 336; *Scott v. Johnson*, 5 Bosw. (N. Y.) 213; *Lee v. Pittsburgh, C. & M. Co.*, 56 How. (N. Y.) Pr. 373; *Martin v. Niagara Falls Paper Mfg. Co.*, 44 Hun (N. Y.) 130; *Fulton Bank v. New York & Sharon Coal Co.*, 4 Paige, Ch. (N. Y.) 127; *Dougherty v. Hunter*, 54 Pa. St. 380; *Neiffer v. Bank of Knoxville*, 1 Head (Tenn.) 162; *Minor v. Mechanics' Bank*, 26 U. S. (1 Pet.) 46; bk. 7, L. ed. 47.

The subsequent and long-continued acquiescence of the directors will operate as a ratification of an act otherwise beyond the authority of the president. *Sherman v. Fitch*, 98 Mass. 59; *Rich v. State Nat. Bank*, 7 Neb. 201; s. c., 29 Am. Rep. 382; *Titus v. Cairo & F. R. Co.*, 37 N. J. L. (8 Vr.) 98; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Chicago & N. W. R. Co. v. James*, 22 Wis. 198; s. c., 24 Wis. 388. But see *Crum's appeal*, 66 Pa. St. 274.

Selling Property, borrowing Money, etc. — He cannot sell the company's property, borrow money in the name of the company, or make a mortgage on corporate property. *Bliss v. Kaweah Can. & I. Co.*, 65 Cal. 502; s. c., 6 Am. & Eng. Corp. Cas. 247; *Hollowell Bank v. Hamlin*, 14 Mass. 178; *Titus v. Cairo & F. R. Co.*, 37 N. J. L. (8 Vr.) 98; *Leggett v. New Jersey Banking Co.*, 1 N. J. Eq. (1 Saxt.) 541; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. (N. Y.) 31; *Crump v. United States Mining Co.*, 7 Gratt. (Va.) 352; *Chicago & N. W. R. Co. v. James*, 22 Wis. 194; *Jesup v. City Bank*, 14 Wis. 331; *Walworth Co. Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325. But it would seem to be held that this is so only if the sale, assignment, or transfer of the property of the corporation requires the use of the common seal. It can only be made in that event with the assent and authority of the board of directors. *Hoyt v. Thompson*, 5 N. Y. 320, 335.

Transfer of Negotiable Instruments. — If, however, the property conveyed is in the form of negotiable instruments, it may be indorsed and transferred in the usual course of business by the president or other officer having charge of the company's business without any special authority. *Hoyt v. Thompson*, 5 N. Y. 320, 335.

It has been said that the president of an insurance company has no implied authority to indorse and negotiate notes belonging to it. *Marine Bank v. Clements*, 3 Bosw. (N. Y.) 600. But authority to do so may be inferred from the course of the company's business. *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Scott v. Johnson*, 5 Bosw. (N. Y.) 213.

Repayment of Loan — Release of Subscriptions, etc. — The president has no authority, as such, to undertake, in the corporate name, the repayment of an unauthorized loan made to the superintendent of the company. *Union Gold M. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565. And he has of himself no authority to release subscriptions to the stock of the corporation. *Custar v. Titusville Gas & W. Co.*, 63 Pa. St. 381.

Release or Surrender of Claim — Stay of Execution. — The president of a bank has no authority *virtute officii* to surrender or release the claim of the corporation against any one. *Olney v. Chadsey*, 7 R. I. 224; *Hodge's Exr. v. First Nat. Bank*, 22 Gratt. (Va.) 51. Nor has the president of an insurance company. *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158. He has no power to stay the collection of an execution in favor of the corporation. *Spyker v. Spence*, 8 Ala. 333.

Authority to commence and defend Actions. — The president of a corporation, being its chief executive officer, may appear and answer for it, and employ counsel for its defence. *Savings Bank v. Benton*, 2 Met. (Ky.) 240; *Oakley v. Workingmen's Union*, 2 Hilt. (N. Y.) 487; *American Ins. Co. v. Oakley*, 9 Paige, Ch. (N. Y.) 496. He cannot, however, confess judgment against the

company. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. (17 Vr.) 237; s. c., 6 Am. & Eng. Corp. Cas. 240. And the president of a manufacturing corporation has no implied authority to commence an action in the company's name. *Ashuelot Manuf. Co. v. Marsh*, 55 Mass. (1 Cush.) 507.

Where President is also Superintendent or Financial Agent. — Where, however, the president is also the superintendent and general agent of the company, he is authorized to make any contract which is within the general scope of the company's business, and necessary to the proper conduct of the same. *Seeley v. San Jose, I. M. & L. Co.*, 59 Cal. 22; *Castle v. Belfast Foundry Co.*, 72 Me. 167; *Lee v. Pittsburgh, C. & M. Co.*, 56 How. (N. Y.) Pr. 373. Thus, the president of a manufacturing company, who is also superintendent, and has a general authority to contract by parol for making or selling its manufactured goods, has also authority to authorize the termination and release of such a contract. *Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R. Co.*, 120 U. S. 256; bk. 230, L. ed. 639.

If he is the company's financial officer, he may receive payment of a judgment in favor of the corporation, and may execute and deliver a satisfaction piece. *Booth v. Farmers' & Mechanics' Nat. Bank*, 50 N. Y. 396.

Railroads — Construction of Road. — In the case of *Griffith v. Chicago, B. & P. R. Co.* (Iowa), — N. W. Rep. 901, it was held that the president of a railroad company has no power, merely by virtue of his office, to bind the company by a contract for the construction of its railroad. The court say, "Plaintiff claims to have done the work under a contract with the New Sharon, Coal Valley, & Eastern Railroad Company; the agreement being entered into on the part of the corporation by S. C. Cook, its president. The name of the corporation was subsequently changed to the Chicago, Burlington, & Pacific Railroad Company. The evidence shows that the work was in fact done under a contract entered into by plaintiff with Cook; but defendants claim that the latter was acting for the Trunk Line Construction Company, and that consequently plaintiff was a sub-contractor. If that claim is true, it is conceded that plaintiff cannot recover as against these defendants, for the reason that he did not take the steps requisite to preserve his lien as against them. The evidence leaves little doubt, we think, but that plaintiff understood, when he entered into the contract with Cook, that the latter was representing the railroad company; and if Cook had been clothed with power to contract for that company, it probably would have been bound by the contract. But there is no evidence that he had that power, and it is shown that the board of directors of the company had already entered into a contract with another person for the performance of the same work, and that that contract had been transferred to the Trunk Line Construction Company, which company has been paid for the work. The case, in its facts, is like *Templin v. Railroad Co.*, decided at December term, 1887, in which we held that the president of a railroad company does not have power, by virtue of his office merely, to bind the company by a contract for the construction of its railroad. That holding is conclusive of the rights of these parties."

See generally, as to Powers of President, *Duncomb v. New York & H. R. Co.*, 89 N. Y. 1; 13 Am. & Eng. R. R. Cas. 84; *Davis v. Memphis City R. Co.*, 22 Ib. 1.

CAMPBELL

v.

TRUSTEES CINCINNATI SOUTHERN RY.

(*Kentucky Court of Appeals, Jan. 10, 1888.*)

Contract for Construction — Interpretation — Haulage. — Where a written contract for the construction of a railroad specifies that the contractor is to receive a written sum per mile for stone "hailed by wagon," the railroad company is not bound thereby to pay for the transportation of stone by rail or steamboat.

Agency — Engineer — Construction of Road — Power to modify Contract. — A written contract entered into by the trustees of a railway company cannot be modified by the construction engineer, nor has he any power to contract verbally with the contractor with reference thereto.

APPEAL from Kenton County Chancery Court.

Suit by P. Campbell against Trustees of Cincinnati Southern Railway Company, for moneys alleged to be due for work and labor performed under contract. Plaintiff appeals from a judgment for a sum smaller than that for which the suit was brought.

J. G. Carlisle and *Paxton & Warrington* for appellant.

William Lindsay and *C. B. Simrall* for appellees.

BENNETT, J. — The appellant brought this action in the Kenton Chancery Court to recover of the appellees the sum of \$231,451.78, with interest thereon from May 14, 1876.

The appellant alleged that this sum was due him as contractor on sections 2, 3, and 4 of division A of the Cincinnati Southern Railway. The appellant also alleges that the appellees' engineer's estimate of the work done by him in constructing the appellees' railway was false, fraudulent, and erroneous, both in quantity and classifications. He asked that the engineer's estimates be set aside, and he be allowed pay for his work and labor according to the contract price. The material points of difference are: *First*, The appellees estimate 124,944 cubic yards of earth excavation, at 12 cents per cubic yard. The appellant claims that there were only 106,047 cubic yards of this work. *Second*, The appellees estimate 58,121 cubic yards of loose rock excavation, at 40 cents per cubic yard. The appellant claims that there were only 41,775 cubic yards of this work. *Third*, The appellees estimate 1,450 cubic yards of solid rock excavation, at \$1.25 per cubic yard. The appellant claims that there were

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11,086 cubic yards of this work. *Fourth*, The appellees estimate 415 cubic yards of excavation in water, at \$1 per cubic yard. The appellant claims that there were 2,010 cubic yards of this work. *Fifth*, The appellees estimate 177,137 cubic yards of embankment, at 12 cents per cubic yard. The appellant claims that there were 203,143 cubic yards of this work. *Sixth*, The appellees allow in their estimate \$9,133.52 for hauling stone. The appellant claims \$156,449.44 for this work. *Seventh*, The appellant claims that he excavated 52,225 cubic yards of hard pan at 75 cents per cubic yard. The appellees deny that he did this work. *Eighth*, The appellant also claims for extra work. The lower court rendered judgment for the appellant for the sum of \$28,276, with interest on \$25,000 of this sum from the 19th of October, 1876, and interest on the remaining \$3,726 from the 7th of July, 1879. The appellant has appealed to this court.

From the foregoing points of difference it will be seen that the appellant and appellees mainly differ about the classification of the material and the hauling of stone. It is to be observed that the points of difference relate exclusively to matters of fact, except the sixth point, which involves a construction of one clause of the written contract made by the appellant and appellees. This record contains over 1,200 pages of printed evidence. All of this evidence relates to the questions of fact put in issue by the pleadings. To attempt to give an analysis of the evidence in this opinion would extend it far beyond a reasonable length, and the result would at last be what we can express in a few words. Therefore it is sufficient to say that the appellant sustains each of his contentions by such evidence as establishes, if uncontradicted, a *prima facie* case. On the other hand, the appellee, by evidence equally as positive and apparently trustworthy, not only contradicts the appellant's evidence, but establishes each of their contentions. In this connection it is proper to remark that it devolved upon the appellant to make out his case by a preponderance of evidence. This court, in the case of *Cummings v. Trustees, etc., MSS.*, which case is in many respects similar to this, decided that where the case before the chancellor involved purely questions of fact, the decision of the chancellor thereon must be regarded by this court in the same light as the verdict of a properly instructed jury; and the chancellor's decision would not be reversed unless it was palpably against the weight of the evidence.

The appellant's contention here is, not that there is no evidence to sustain the judgment of the lower court, but that the judgment is against the weight of the evidence. As just said, the burden was upon the appellant to make out his case. His evidence, if

Evidence.
Appellant's
duty to make
out case.

uncontradicted, establishes a *prima facie* case. On the other hand, the appellees' evidence, if uncontradicted, establishes a *prima facie* case for them. The contentions of both appellant and appellees are sustained by positive and direct testimony. The testimony on the one side is positively irreconcilable with that on the other side. The chancellor having a better opportunity than this court to know the standing of the witnesses, and it being peculiarly within his province to weigh their evidence, and give it such credence as in the exercise of a sound and impartial judgment he thought was due, this court cannot reverse his decision, although we might come to a different conclusion as to the mere weight of the evidence. But, before reversing, we must be able to say that his findings are clearly against the weight of the evidence. This we cannot do.

By the terms of the written contract the appellant was to receive for hauling stone 75 cents per cubic yard for every mile the stone was hauled by wagon, and a proportionate rate for every fraction of a mile. The appellant claims \$156,449.44 for extra haul of stone. The haul of this stone was by rail and steamboats. The appellant claims, first, that these means of transportation are within the meaning of the contract. To this proposition we cannot agree — *First*, because the language "hailed by wagon" does not, in the common acceptation of the term, mean a transportation by rail or steamboat; *second*, in the original specifications which were submitted to the appellant the word "wagon" was not used, but the word "wagon" was written in the contract signed by the appellant. By the original specifications the appellant would have been entitled to pay for transporting stone by any kind of conveyance; but the word "wagon" was inserted in the contract as an expressed limitation, by which the appellees bound themselves to pay for the hauling of stone by wagon only.

Interpretation
of contract.
Haulage of
stone.

The attempt of the appellant to prove, that, by verbal contract with the appellees' engineer, he was to have the same price for hauling this stone, must fail, for two reasons: *First*, his evidence is flatly contradicted; and the lower court passed upon it, and we see no reason for disturbing the decision. *Second*, the engineer had no power to contract with the appellant in reference to that matter, nor did he have power to change or modify the written contract.

Modification of
contract by
engineer.

The judgment of the lower court is affirmed.

LOUISVILLE, EVANSVILLE, & ST. LOUIS R. Co.

v.

DONNEGAN.

(Indiana Supreme Court.)

Contract for Construction — Stipulation — Estimate of Engineer. — A stipulation in a contract for the construction of a railroad, that the engineers of the company should make final estimates of the quality, character, and value of the work done, and that such final estimates should be final and conclusive against the contractors, "without further recourse or appeal," does not deprive the contractors of the right to resort to the courts for a redress of wrongs, and for the recovery of whatever may be due them.

Same — Incompetency of Engineers. — Where it is shown, that, owing to the negligence, carelessness, incompetency, and mistake of the company's engineers, the statements of the work done under such a contract for the construction of a railroad are in many instances incorrect, the contractors are entitled to recover what is due them in an action at law, notwithstanding the estimates of the engineer.

Same — Delay in Construction. — A provision in a contract for the construction of a railroad, that, in the event of the contractors failing to employ such a force as the company's engineer might deem adequate to the completion of the work within a fixed time, the engineer might employ such number of workmen as in his judgment would be necessary, pay them such wages as he might find necessary and expedient, and charge the contractors with the amount of so much paid to them under the contract, does not authorize the engineers to exclude the contractors from the work arbitrarily, or on account of delay caused by his own fault, negligence, and incompetency.

Same — Length of Piling — Mistake of Engineer. — Where, by a contract for the construction of a railroad, it is stipulated that the contractors are to be paid only for the lineal feet of piling actually used in the work, the contractors will, notwithstanding such provision, be entitled to recover from the company the loss occasioned by the mistake of the engineer in ordering the piling a greater length than necessary, which necessitated the cutting of the same.

Same — Time required for Construction — Expert Testimony. — In an action upon a contract for the construction of a railroad, where the question of the time required to complete the work contracted for is material, the testimony of railway builders engaged in such work, as to the length of time in which it could be reasonably completed, is competent.

APPEAL from Vanderberg Circuit Court.

Action by James Donnegan and others, as partners, against the Louisville, Evansville, & St. Louis Railroad Company, to recover the amount alleged to be due to them under a contract with defendant for the construction of certain sections of its road. Judgment for plaintiffs. Defendant appeals. The opinion states the case.

Asa Iglehart, John E. Iglehart, and Edwin Taylor for appellant.

J. S. Buchanan, H. C. Gooding, and Cicero Buchanan for appellees.

ZOLLARS, Ch. J. — In April, 1881, appellees, as partners, entered into a written contract with the railway company for the construction of a certain section of its road in the State of Illinois. It was therein agreed that the work should be completed on or before the first day of August, 1881. It was expressly stipulated that time should be of the essence of the contract. Appellees undertook to do all the grading, masonry, and all such other work as might be necessary to construct the stipulated section of the road, in accordance with the specifications, made a part of the contract, as they might be applicable, and agreeably to the directions of the engineer in charge of the work, given from time to time during the progress of the work. The work was to be paid for by the company, upon monthly and final estimates made by its engineers; and it was expressly stipulated that the estimates thus made by the engineer in charge of the work should be conclusive, as against appellees, "without further recourse or appeal."

Facts.

The chief engineer might review those estimates; and, if he did so, his estimates were to be substituted for the estimates reviewed.

For extra work the company was to pay the cost and ten per cent additional. The extra work was to be estimated by the company's engineer, and these estimates were also to be final and conclusive as against appellees. Appellees were to employ such a force of workmen as the engineer might deem adequate to the completion of the work within the time fixed. If they did not employ such a force as the engineer might thus deem adequate, he might employ such number of workmen as in his judgment would be necessary, and, at such wages as he might find necessary and expedient, pay all such persons, and charge appellees with the amount as so much money paid to them upon the contract.

Power was also given to the company's chief engineer to annul the contract, upon a written notice to appellees, if, in his judgment, the work was not prosecuted by them in a proper manner and with sufficient speed. It was also stipulated, that, upon thirty days' notice to appellees, the company might at any time, without cause, annul the contract, in which event they should be entitled to pay for work done up to that time. The right was reserved to the company's chief engineer to order, in writing, any modification or alteration to be made in the specifications, profiles, and plans, and in like manner to direct and order the

omission of any portion of the work mentioned in the specifications, or to substitute any other work for such portions. If he should determine upon earthworks, bridges, culverts, walls, or other work, in addition to that embraced in the contract, appellees were bound to do such work for the prices agreed upon for like work, and upon the same terms and conditions, except with regard to the time of completing the work, which might be reasonably extended at the discretion of the chief engineer.

The first paragraph of appellees' complaint was based upon that contract and its violation by appellant. It is alleged herein that appellees began the work at once, furnished material, and continued to construct the road under the contract, until in August, 1881, when the railway company, without right and against their will, took charge of the work, and prosecuted the same to completion; that they, without fault on their part, were prevented from completing the section of road specified in the contract, within the prescribed time, because of the company failing to procure the right of way, because of extra work ordered by the engineer, because of the engineer failing to furnish the height, centres, and specifications of bridges and culverts, because of changes in the work ordered by the engineer, and because of the incompetency of the engineer; that, after the work was taken out of their hands, the company prosecuted the same at a reckless and exorbitant cost, far in excess of what was required or necessary; that, subsequent to the written agreement, the amount to be paid by the company per cubic yard for earth was fixed by a parol agreement; that, in the final estimate, the amount required by the engineer as due to appellees for earthwork done by them was too small (giving the figures); that the engineer ordered and directed that the piling for bridges should be of a certain length; that, being ignorant as to the proper length required, they obeyed, and, under the contract, were compelled to obey, the instructions of the engineer; that after the piling were furnished, the engineer ordered them to be shortened, and in the final estimate allowed appellees only for the amount of lineal feet actually used, and neglected and refused to allow them for the amount so cut off; that an excessive, unwarranted, and fraudulent amount was charged against appellees, by the engineer, for placing bridge and culvert timbers furnished by them before their discharge from the work, which amount the engineer, in his final estimate, deducted from the amount due to them; that, subsequent to the written agreement, it was orally agreed between the parties that appellees should be allowed two dollars per thousand feet extra on a large amount of bridge and culvert timbers, because the same was purchased by them at an extra cost, at the request of the company through its proper officers; that, in the final estimate

by the engineer, said extra amount so agreed upon was not allowed to appellees; that the company ordered the appellees to remove their pile-driver some six miles beyond the section, to do extra work, and agreed to pay for such removal and extra work, and that the amount agreed upon was not returned by the engineer in his final estimate; that by the failure of the company to procure right of way, and the failure of the engineer, upon the request of the appellees, to furnish heights and centres, and to lay out the work, their men were left idle, to their damage in a large sum (giving the amount); that in the final estimates the engineer did not return the full amount due to appellees for iron furnished by them. It is averred that the engineers in charge of the work, whose orders appellees were bound to obey, and who made the monthly and final estimate, were incompetent and unfit for the duties assigned them; that appellees were not allowed to inspect either the monthly or final estimates; and that, acting in collusion with the company, the engineers, at the time knowing that their estimate was too low, and false, and fraudulent, made them as they did for the purpose of cheating and defrauding appellees.

Another written contract, similar in all essentials to the above-mentioned, except as it had reference to other sections of the road, was entered into by the parties, at about the same time, for the construction of another section of the railroad in the State of Illinois; that contract provided that the work should be completed on or before the first day of August, 1881. The second paragraph of appellees' complaint was based upon that contract, and its violation by appellant. The wrongs charged upon appellant in that paragraph are of the same nature as those charged in the first paragraph, and were charged in substantially the same way.

In June, 1881, a third written contract was entered into between the parties for the construction of certain sections of the road in the State of Indiana. That contract, again, was similar in essentials to the others, except as it had reference to other sections of the road. The third paragraph of appellees' complaint was based upon that contract, and violation of it by appellant. And here, again, the wrongs charged upon appellant are of the same nature, with the exception of some additional charges as to stone, etc., as those charged in the first paragraph of the complaint, and were charged in substantially the same way.

The fourth paragraph of the complaint is based upon the three contracts above mentioned, and alleges that they all related to the work upon the same road, and, in fact, constituted but one contract, and were so treated by the parties; that payments were made upon all three indiscriminately; that the accounts were so kept by the railway company and the appellees, that amounts due

to them upon and under any one of the separate contracts could not be distinctly ascertained; that the work done and material furnished by appellees, up to the time when the work was wrongfully taken charge of by the railway company, amounted to \$80,000; that if they had been allowed to complete the work under contract, as they would have done but for the wrongs of the railway company, which are stated as in the other paragraphs, there would have been due to them from the railway company \$96,000; that the fair and reasonable cost of furnishing the materials and doing the work according to the contract would not have exceeded \$65,000; that appellees were entitled to recover the difference between that amount and \$80,000 for materials furnished and work done under the contract, and \$5,000 profits which would have been made by them on the work done and materials furnished by the railway company in the completion of the work, etc.

It is sufficient here to state that the answers by appellant generally and specially denied all indebtedness, and all charges of wrong against it and its engineers and agents, and all charges of mistake and incompetency on the part of its engineer, whether as connected with estimates or otherwise. They further charged that the failure on the part of appellees to complete the work within the time fixed was caused by their own neglects and wrongs; that the company made liberal advances to them as the work progressed; and that they fraudulently failed to pay for materials and labor, and thus involved the company in expensive litigations. It was further alleged that the company did not take the work from appellees as charged; that, on the contrary, the work was done by their employees under foremen of their own choosing, subject only to the proper directions of the company's engineers, and such supervision in the disbursement of moneys as was rendered necessary by the fraudulent conduct of appellees, etc. The trial court made the following special finding of fact and conclusions of law:—

SPECIAL FINDINGS.

“1. That the plaintiffs and defendant entered into the contracts mentioned and described in the plaintiffs' complaint, and therein stated.

“2. That in due time and with a reasonable force the plaintiffs entered upon the work of performing and completing the several contracts.

“3. That on account of an insufficient number, and the incompetency or negligence, or both, of the local or resident engineers upon all the sections embraced in the two contracts in

Illinois and the contract in Indiana, the prosecution of the work by the plaintiffs was greatly interfered with and delayed.

"4. That, when the contractors were ready to do the work, the necessary staking and alignment of the road had not been made or done; and the engineers' work in this respect, and also in furnishing the necessary data for bills of lumber for bridges, and proper designations as to where bridges, culverts, and piles were needed and expected to be placed, and the failure to procure the right of way in different places, — each and all substantially interfered with and delayed the prosecution of the work.

"5. That, owing to the negligence, carelessness, incompetency, and mistakes of the company's engineers, the statements of the work were in many instances incorrect.

"6. That the plaintiffs could, and, so far as the evidence shows, would, have completed each of the several contracts mentioned in the complaint, in the manner therein prescribed, and within the time limited by said contracts, if they had not been hindered and delayed by the fault, negligence, insufficiency, and incompetence of the defendant's engineers.

"7. That the work was taken out of the control of the plaintiffs on the twentieth day of October, 1881, and that the agents of said railway company incurred and permitted more expenses than, even at that season of the year, were necessary or proper for the completion of the work.

"8. That had the defendant's employees been without fault, negligence, or incompetency, and had they not caused the delay of, and interference with, the work, the several contracts could and would have been completed at much less cost and expense, before the season had become unfit for that kind of work, and by the 1st of November, 1881.

"9. That the work was conducted by the employees of the defendant, after it was taken out of the hands of the plaintiffs, in a negligent, careless, and reckless manner, both as to the manner of doing the same and making payments therefor, by reason of which that part of the work was made to cost at least twenty per cent more than it ought to or would have cost if it had been done prudently and with proper regard to the rights of the plaintiffs.

"10. That a fair estimate of the work done upon the contracts at the prices agreed upon, and for extra work, and including reasonable estimates for losses on account of mistakes and delays, would have been \$103,500.

"11. That a fair estimate of the money actually paid by said railway company to Donnegan & Co., and properly paid in the completion of the work under the contracts, would not exceed \$90,368.

"12. As a conclusion of law upon these facts, and the evidence in the case as taken by the stenographer, the court finds that there is due to the plaintiffs from the defendant the sum of \$13,132, with interest at six per cent, allowed as damages, from the respective times at which the same should have been paid, amounting to \$2,350, making the sum of \$15,482.

"13. Thereupon the court finds that the plaintiffs are entitled to recover of and from the defendant, upon their complaint herein, the sum of \$15,482.

"WILLIAM F. PARRET, *Judge V. C. C.*"

The first proposition discussed by appellant's counsel is, that the court below erred in its conclusion of law upon the above facts. One of their contentions is, that, in order to avoid the conclusive effect of the estimates made by the engineers of the railway company, it was incumbent upon appellees to prove that those estimates were the results of fraud, accident, or mistake; that the trial court did not so find, and that hence appellees are bound by those estimates, and cannot recover in this action. As we have seen, one of the stipulations in the contract was, that the engineers of the railway company should make final estimates of the quality, character, and value of the work done by appellees, and that such final estimates should be final and conclusive, as against appellees, "without further recourse or appeal." That stipulation in the contract did not and could not deprive appellees of the right to resort to the courts for a redress of wrongs, and for the recovery of whatever may have been due them. The reason why such a stipulation is invalid has been so fully stated by this court, that nothing more is required here than a citation of the cases. *Bauer v. Samson Lodge Knights of Pythias*, 102 Ind. 262, and cases there cited; *Supreme Council of the Order of Chosen Friends v. Garrigus*, 104 Ind. 133.

But counsel's contention cannot be maintained upon any theory. They seem to have overlooked some of the findings of the court. The fifth finding was, that, owing to the negligence, carelessness, incompetency, and mistakes of the company's engineers, the statements of the work were in many instances incorrect. That finding is entirely sufficient to show that the estimates made by the company's engineers were incorrect, and to entitle appellees to recover what was due them, notwithstanding such estimates. The tenth and eleventh findings are in accord with, and lend support to, the fifth.

It is further insisted by appellant's counsel that there is no

Effect of
stipulation as
to engineer's
estimate.

Same. Incom-
petency of
engineer.

finding that appellees were wrongfully excluded from the work, and that such a finding was necessary to support the conclusions of law. That the work was taken out of the control of appellees by the railway company is definitely stated in the seventh finding. And, taking the findings as a whole, we think they sufficiently show that appellees were wrongfully excluded from the work. The contract provided that if appellees did not employ such a force as the company's engineer might deem adequate to a completion of the work within the fixed time, he might employ such number of workmen as in his judgment would be necessary, pay them such wages as he might find necessary and expedient, and charge appellees with the amount as so much paid to them under the contract, etc. Those provisions of the contract must be given a reasonable construction. It certainly was not intended by the parties that the engineer in charge should arbitrarily, at any time, and without any sort or shadow of reason, take the work out of the control of appellees, and employ men at his pleasure. Nor could it have been intended that appellees should be subject to the whims of an incompetent, negligent, or dishonest engineer. And still less could it have been intended that the engineer might take the work out of the control of the appellees, and employ men, etc., on account of delays caused by his own fault, negligence, and incompetency. There was at least an implied undertaking on the part of the railway company that the engineer to be put in charge, with such extended powers, should be competent, honest, and reasonably careful, and that he should not make delays caused by his wrongs a pretext for taking the work out of the control of the appellees.

Delay in construction.
Exclusion from work.

It was stated in the special findings, that on account of an insufficient number, and the incompetency and negligence of the local engineers, the prosecution of the work was greatly interfered with; that appellees were hindered and delayed in the prosecution and completion of the work by failure on the part of the company to procure right of way, and by failure on the part of its engineers to furnish proper stakes, to locate bridges, culverts, etc.; and that appellees could and would have completed the work within the time limited by the contract if they had not been hindered and delayed by the fault, negligence, insufficiency, and incompetency of appellant's engineers, etc. As before stated, the findings show that the work was taken out of the control of appellees, and, as we think, show that it was wrongfully taken out of their control.

It is further contended by appellant's counsel that the several findings of facts by the court below are not sustained by sufficient evidence. This court will not undertake to settle the con-

flicts that may be found in the sixteen hundred pages of evidence. That was for the learned judge who tried the case below, and had opportunities of judging of the credibility of witnesses which an appellate court cannot have. We have ascertained that there is evidence tending to sustain all of the findings of the court. That fact having been ascertained, the established rule applies, which forbids a reversal of the judgment upon the weight of the evidence.

In appellant's motion for a new trial, fifty-one causes were assigned, the most of which have reference to the admission and exclusion of evidence. These are all urged here; but, as to the most of them, appellant's counsel have done nothing more in their brief than to restate the causes. That does not meet the requirements of the rule in relation to briefs in this court. In some instances the pages of the record where the rulings of the court may be found are not given. In many others it is impossible for us to determine, from the limited amount of the evidence pointed out by reference to the pages of the record, whether or not there was error in the rulings. Parties asking for a reversal of a judgment must furnish references to such portions of the record as will show that errors intervened in the proceedings below.

One of the appellees was allowed to testify that appellant's engineer in charge of the work, on one occasion, directed that piling of a certain length should be furnished, and that, after they were furnished upon the ground, of the length directed, the engineer ordered that portions should be cut off, which was done. Appellant's counsel insist that there was error in the admission of that testimony, for the reason, that, by the contract, appellees were to be paid only for the lineal feet of piling actually used in the work. We are not convinced that the admission of the testimony was erroneous. If it was competent for any purpose, its admission was not available error. It was competent, we think, as tending to show, in some degree at least, that the engineer was incompetent and careless, and that appellees were hindered and delayed in the prosecution of the work, and hence were not in default. What weight should have been given to the testimony is another question. We have no means of knowing how much importance the court below may have attached to it, nor that it was considered at all by the court in fixing the amount of recovery in favor of appellees. But, assuming that it was, and that the evidence was admitted for that purpose alone, we are yet not convinced that its admission was an error such as would justify this court in overthrowing the judgment. Appel-

lant's engineers, under the terms of the contract, were put in charge of the work with almost absolute authority as to the manner in which the work should be done. Having and exercising such authority as the representative of appellant, it cannot be said that appellees, and not appellant, should suffer the loss occasioned by his mistake or wrong in ordering the piling to be of certain length.

One of the appellees was also allowed to testify, that, but for the delays which he had mentioned as having been caused by appellant and its engineers, the work contracted for could have been completed within the time fixed in the contract. Some of appellees' sub-contractors were also allowed to testify, that they could have completed the work embraced within their contracts, on or before certain named dates, within the time for completion fixed by the contract between appellant and appellees. It is contended by appellant's counsel that the testimony was incompetent because it consisted of inferences or opinions. The witnesses were railway builders, who, by reason of their experience, may properly be termed experts. An expert has been described as nothing more than a man of experience in the particular business to which the inquiry relates; as one having peculiar knowledge or skill in reference to the subject-matter of inquiry; as a person instructed by experience. Lawson, Exp. Ev. pp. 195, 196; *Doster v. Brown*, 25 Ga. 24; *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290.

Time required
for construc-
tion. Expert
testimony.

Non-expert witnesses may state their opinions as to matters with which they are especially acquainted, but which cannot be specifically described. *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; *Yost v. Conway*, 92 Ind. 464.

It has been said that a non-expert witness must, so far as possible, state the facts upon which he bases his opinions; that, when the case is one in which all the facts can be presented to the jury, no opinion can be given; that there are cases where the witness cannot put before the jury, in an intelligible and comprehensive form, the whole ground of his judgment or opinion, and that in such cases he may give his opinion, first stating the facts, so far as he can, upon which the opinion is based.

We agree with counsel as to the nature of the testimony to which they object; but, considering the qualifications of the witnesses, the nature of the subject-matter of the inquiry, and the statement of facts by the witnesses, we think that the testimony was competent. A person of experience in building railways can doubtless form a more correct judgment as to the length of time required to construct and complete a section of road than persons without such experience can, even though.

they may have knowledge of all the facts which can be stated by witnesses. *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18; s. c., 28 Am. & Eng. R. R. Cas. 308; *Jeffersonville R. R. Co. v. Lanham*, 27 Ind. 171; *Lawson*, Exp. Ev. pp. 79, 95, 460, and cases there cited; *Rogers*, Exp. Testimony, sect. 116, and cases there cited.

We are not advised upon what ground appellant's question to appellee Conkey, as to the reliability and responsibility of appellees' sub-contractors, was ruled out. It may have been upon the ground that the question was not within the scope of a proper cross-examination. In the absence of any thing more than is shown in the briefs, we must presume that the court below ruled correctly.

Nor can we say that the court erred in admitting testimony as to the cost of delivering piling along the line of road. Appellees contended that appellant had hindered and delayed them in the prosecution of the work; and had wrongfully taken the work out of their control, and completed it at a reckless and extravagant cost, and charged them with it. As bearing upon that issue, it was competent for them to show the reasonable cost of the work.

We do not think that it would be profitable to extend this opinion farther upon the several causes assigned for a new trial, all of which we have examined. In our examination of the record, assisted by the arguments of counsel, we have discovered no error which would justify a reversal of the judgment.

Judgment affirmed, at appellant's costs.

Construction Contract — Interpretation.— Under a contract for the construction of a railroad, by which payments equal to eighty-five per cent of the contract value of the work to be done were to become due and payable monthly, and fifteen per cent of the contract value of the work done each month was to be retained by the company, and to be paid within ninety days after the entire completion of the work, although the contract is entire, each separate monthly payment, as it becomes due, constitutes a separate demand (see *Union R. Co. v. Traube*, 59 Mo. 363), for the recovery of which an action can be maintained; and in the event of the non-payment of the retained percentage, an action may likewise be maintained for its recovery as a separate and distinct demand, and such retained percentage may be assigned independently of the other sums becoming due under the contract. *Adler v. Kansas City, S. & M. R. Co.*, 92 Mo. 242.

Assignment of Part of Price — Sufficiency of Notice.— The S. & M. R. Co. was incorporated under the laws of Arkansas, and the K. C., S. & M. R. Co. was incorporated under the laws of Missouri. Both corporations were organized as a part of the same enterprise and were under the same management; the same persons holding the chief offices in both, and the general offices of the company being kept together. A contractor for the construction of part of the road of the S. & M. R. Co., by a letter addressed to the president of the two companies as "Pres't and manager K. C., S. & M. R. Co.," assigned certain sums retained by the company under the contract.

Held, that, under the circumstances, the assignment was sufficient; and that if the subject-matter of the assignment was understood alike by the parties affected thereby, the court should disregard the abbreviation "K. C.," and treat the paper as properly addressed, and that evidence was competent to explain the intent, and charge the latent ambiguity. *Adler v. Kansas City, S. & M. R. Co.*, 92 Mo. 242.

Estimates of Engineers in Construction Contracts.— See *Kistner v. Indianapolis, etc., R. Co.*, 12 Am. & Eng. R. R. Cas. 314; note, 24 Ib. 352; *Galveston, etc., R. Co. v. Henry*, 25 Ib. 265.

INDIANA, BLOOMINGTON, & WESTERN R. Co.

v.

ADAMSON *et al.*

(*Indiana Supreme Court, Jan. 24, 1888.*)

Parties — Death of Joint Contractor — Action by Survivor.— The Indiana Code of Civil Procedure does not change the principle of the common law which vests the whole right in a joint contract in the survivors; and such survivors, being the real parties in interest, may maintain an action thereon without joining as co-plaintiffs the representatives of a deceased joint contractor.

Contract for Construction — Stone Culvert — Obligation upon Company. — Where a railroad company agrees with a party conveying land to it for the right of way to construct an embankment along a river, and to construct and maintain in and through such embankment a good and sufficient stone-box culvert of a specified size, so constructed that it will be sufficient to permit the escape of overflow water on adjacent land belonging to such party, the railway company are bound to put in the culvert in a reasonable and sufficient manner, so that it will fairly accomplish the object in view; and, even in the absence of any specific agreement to put back the dirt in the neighborhood of such culvert, the company will be bound to do so if it is necessary to a proper and reasonable performance of the work it undertakes to do.

Agency — Authority — Circumstantial Evidence.— Where a person acts openly as the company's agent in the construction of a work under such circumstances as imply knowledge on the company's part, his agency to act on behalf of the company is established *prima facie*, and his declarations made while actually engaged in directing or supervising the work of the construction are admissible in an action connected therewith.

APPEAL from Fountain County Circuit Court.

Action to recover damages from the defendant company for failure to perform the obligations imposed on it under the contract with plaintiff. The opinion states the case.

C. W. Fairbanks and *Thomas F. Davidson* for appellant.

Nebeker & Dochterman for appellee.

ELLIOTT, J. — The appellees describe in their complaint a tract of land owned by them and Nellie Adamson in October, 1880, and allege that they and Nellie Adamson entered into a contract — not a clear one — with the appellant. The statement of the contract is as follows; viz., that they, the plaintiffs, should execute to the defendant a quit-claim deed for a strip of land out of said land, 100 feet wide and 435 feet long; and permit the defendant to construct and extend an embankment from its then terminus over said land in an easterly direction, until it should meet with and intersect with the west end of said bridge; and release said defendant from all damages that should accrue to them on account of the said embankment or the overflow of water, in consideration of which the defendant agreed to maintain its road so the plaintiffs could have the benefit of the same, pay plaintiffs and said Nellie Adamson \$100, and construct and maintain in and through the said river embankment enclosing said land a good and sufficient stone-box culvert, the hole of which should not be less than two feet wide by four feet high; that the same should be constructed in a reasonable time and at the point designated by the plaintiff, and should be so constructed that it would be sufficient to carry off and permit the escape of the overflow water on said land well and sufficiently, then and in the future; and it was further agreed by the defendant that the plaintiff and Nellie Adamson should have a passage-way along said embankment, along the river at the east end of the fill, so to be made by the defendant, the bottom of which was not to be lower than the high-water mark of said river; and it was further agreed by the defendant that the river embankment was to be left unimpaired, except where it was cut or removed by putting in said culvert." It is averred that the plaintiff and Nellie Adamson did execute a quit-claim to the defendant, and fully performed their part of the contract, and that Nellie Adamson has since died. It is also averred that the defendant did not perform its part of the contract, but of the provisions in violation thereof, tore down the river embankment, and has failed to put in a stone-box culvert.

The appellant contends that the demurrer to the complaint on the ground of a defect of plaintiffs is well taken, because neither the heirs nor the representatives of Nellie Adamson are made parties to the action. In answer to the appellant, the counsel for the appellees assert that, as the contrary does not appear, it must be assumed that the heirs of Nellie Adamson are parties. This position is not tenable. The complaint does not profess to assert a right in any of the plaintiffs as the heirs or representatives of Nellie Adamson, but proceeds exclusively on the theory that the cause of

action is in them in their own right. They sue as in the right of original contracting parties, and not in the capacity of heirs or representatives of a deceased party. It cannot, therefore, be inferred in aid of the complaint that the heirs or representatives of Nellie Adamson are parties to the action. This inference cannot be made without assuming that the plaintiffs sue in a different capacity from that which they themselves profess, and this assumption cannot be justly made. It is a familiar rule of pleading, that a demurrer admits only such facts as are sufficiently pleaded; and it is quite as well settled that facts must be directly averred, and not pleaded by way of recital. *School Tp. v. Farlow*, 75 Ind. 118.

There is no direct allegation that Nellie Adamson was the wife of John M. Adamson, although, in a deed set forth in the complaint, that fact appears by way of recital; but a recital in an instrument not the foundation of the action is not the allegation of a traversable fact. It is, indeed, very doubtful if a recital of the character here under discussion would be sufficient, even if found in an instrument on which the pleading was based. But, however this may be, it is quite clear that it cannot be regarded as sufficient when contained in a mere collateral instrument. This conclusion excludes from the discussion the authorities which bear upon the question of the right of a husband, as the survivor of his deceased wife, to maintain an action for injuries to property jointly owned by them. Authorities declaring the rule in cases of partnership are not of controlling force. The rules which apply to contracts with partners rest upon essentially different principles from those which govern cases of joint contracts. The rights of partners are, in many respects, very different from those of joint obligees. The relations of the partners are different; and the rules which govern actions brought by them, or against them, are not the same as those which obtain where parties are united in a joint obligation, and not associated in a partnership. We exclude, as without controlling force, although they may be remotely analogous, the authorities which govern actions brought by surviving partners. The process of elimination which we have pursued, trims the case down to the question whether, under the Code of Civil Procedure, the survivors may bring an action on a joint contract, without joining the heirs or representatives of the deceased obligee. That they might have done so at common law is indisputable. Dicey, Parties, top page 149. If the Code has not changed the rule, they may still do so. The question with which we have to deal is important, and not entirely free from difficulty; but, after the most careful study we have been able to give the

Allegation
of relation
of husband
and wife.

Death of joint
contractor.
Action by sur-
vivor.

subject, we feel bound to hold that the Code does not change the common-law rule. The question goes back of the procedure, and takes up the element of the right itself. The right the statute does not profess to change; it reaches only the remedy. In the case of a joint contract, the whole right, the unified interest, vests in the survivors. Upon them falls the entire right. If they do possess the entire right, then they are the real parties in interest; since it is inconceivable, that, if they do profess the entire right, any other person can be a real party in interest. The principle of the common law, vesting the whole right in the survivors, is not changed by the Code; and so long as the principle remains unchanged, the persons possessing this entire right must be regarded as the real parties in interest. It requires legislation to abrogate a rule of law, and the courts cannot assume the functions of the Legislature. Mr. Pomeroy, who has as strongly as any one urged a liberal construction of the Code, and an extension of its provisions, affirms that the common-law principle has not been abrogated. In discussing the question he said, "In actions *ex contractu*, all persons having a joint interest must be made plaintiffs; and, when one of them dies, the action must be brought and must proceed in the names of the survivors; the personal representatives of the deceased obligee or promisee cannot be joined as co-plaintiffs; and in the same manner, in actions *ex delicto*, for injuries to personal property, all the joint owners must unite, and, if one of them dies, the action is to be prosecuted by the survivors alone. These common-law rules remain in full force." Pom. Rem. sect. 226.

We think it was competent to prove what it would cost to repair the embankment along the river. The appellant, in cutting through this embankment, and failing to do the work properly and with reasonable care and skill, violated the contract made with the appellees, and must respond in damages. We regard it as settled law that a party who agrees to perform an act, and fails to keep his agreement, must pay compensation for all injuries that naturally and proximately result from the breach. The result is to be reached by taking into consideration the contract and attendant circumstances; for, as the books frequently say, a contract is to be read by "the light of the surrounding circumstances." It would be productive of confusion and injustice to take a contract and enforce it without regard to the situation of the parties and of the subject-matter. No rule of law of which we have any knowledge will sustain such a course. A contract cannot be isolated and construed without regard to the circumstances under which it was made. Where a party agrees to construct, maintain a river embankment, or do other work upon it, and the circum-

Breach of contract for construction of culvert.

stances are such as show that it was the intention of the parties that the embankment should be so maintained as to prevent overflows, and so that it might be used as a roadway or the like, the promising party is answerable for the consequences resulting from the action of freshets and floods upon the embankment. It seems clear to us, that, where such a contract is made, the parties must have had in contemplation such a probable result. There was, therefore, no error in permitting the appellees to prove the cost of repairing the break or hole in the river embankment.

It is urged that the questions asked the witnesses on this subject were in the present tense, and therefore had reference to the time of trial. But no such objection was stated to the trial court, and the objection cannot be considered here; for, on appeal, only such objections are available as were specifically stated to the trial court.

Same. Duty to put back the dirt.

The contract between the parties must receive a reasonable construction; and, giving it such a construction, it requires that the appellant should put in the culvert in a reasonably careful and skilful manner, so that it will fairly accomplish the object the parties designed that it should do. While it is true that there was here no specific agreement to put back the dirt, yet that was unquestionably the duty of the appellant, if it was necessary to a proper and reasonable performance of the work it had undertaken to do. Whether it was necessary was a question to be decided on the whole evidence; and it could not be decided on an objection to the admission of testimony, if there was any evidence fairly warranting the conclusion that it was a necessary part of the work which the appellant had undertaken to perform. *Pedigo v. Grimes*, 13 N. E. Rep. 700 (this term). There unquestionably was such evidence.

One of the appellee's witnesses was asked this question: "How would a culvert have to be made over there, at the locality mentioned in the complaint, to endure the ordinary pressure of the water and be secure?" There was no error in overruling the objection of the appellant to this question. The stone-box culvert contracted for was clearly intended by the parties to be one reasonably well suited to the purpose it was intended to accomplish. Where parties contract for such work, it is understood as part of the contract that it shall be so placed and so constructed as to be reasonably well adapted to accomplish the purpose designed. We suppose it to be perfectly clear that the appellant had no right, under the contract, to construct a stone-box culvert at such an elevation or angle as that it would be practically useless. What the parties contemplated was a culvert of the kind

Proof of possibility to construct a permanent culvert.

and dimensions specified, that would be reasonably well built and reasonably well adapted to accomplish what the parties expected it would accomplish, if suitably located. Whatever was necessary to make a culvert of the kind and dimensions complete, and reasonably well adapted to the purpose designed, the contract bound the appellant to do. We think the learned counsel gives the contract a much narrower construction than reason or precedent warrants. Our conclusion is, that the contract does bind the appellant to make the culvert reasonably secure; and if, to do this, required a stone foundation or any work of like nature, it was bound to do that work. It is never necessary that a party who contracts for a bridge, culvert, or the like thing, which he knows is intended for a designated place, and designed for a particular purpose, should state at full length and in minute detail just what shall be done. The law, unless excluded by the terms of the contract, enters as a silent factor into every such contract, and binds the promisor to do the work with ordinary skill and care, so that, when complete, it shall be ordinarily well adapted to the purpose for which it was intended. The appellant, having agreed to construct and maintain a culvert at the place indicated, was bound to do so, and to make it reasonably effective for the purpose it was intended to accomplish; so that it is not excused, although accidents or natural causes may have made the work much more difficult than it was supposed it would do. It is seldom that a promisor is excused on the ground that the performance of his agreement is practically impossible; for the general rule is, that, having bound himself to do a thing not absolutely impossible in itself, he must do all incidental work necessary to make performance possible, even though it entail upon him work and expense not foreseen by him. Pol. Cont. c. 7. We think it was competent for the appellees to prove that it was practically possible to construct a permanent culvert, although we doubt whether they did not, in attempting it, assume a greater burden than the law imposes upon them. But if they did, the appellant, at all events, has no cause of complaint.

We have no doubt that it was competent for the appellees to prove the consideration of the contract. We do not regard the question upon this point as outside of the issues. We are inclined to agree with appellant's counsel that the answer to the question as to the ownership of property above the railroad was incompetent, but we cannot agree that the question to which the answer was addressed was improper. Our opinion is, that it was competent for the appellees to prove the situation of the subject-matter of the contract and its surroundings, as well as their interest in adjoining property, and this is really all that the

**Proof of
consideration
and situation
of subject-
matter.**

question called for. As there was no motion to strike out the answer, and as the question was not in itself improper, we cannot hold that there was any available error. If, however, we are wrong in this, we could not reverse, because it is apparent that the answer did the appellant no harm.

The relation of principal and agent may be established by circumstantial evidence. We think that the evidence shows, *prima facie* at least, that Mr. Sherman was the chief engineer of the appellant, and, as such, had supervision of the construction of the culvert, and the work connected with it. Whether he was or was not, in fact, the appellant's agent, was a matter peculiarly within its own knowledge; and proof that he was openly acting in that capacity, under such circumstances as implied knowledge on its part, made a *prima facie* case, and entitled the appellee to give evidence of his declaration made while actually engaged in directing or supervising the work of constructing the culvert.

Proof of
agency.
Circumstantial
evidence.

We accept, as a substantially correct statement of the general rule, counsel's assertion that a plaintiff who does not use ordinary care to prevent the aggravation of damages cannot recover for the increased loss which ordinary care might have prevented; but we do not understand that the rule requires the plaintiff to do the work the defendant contracted to do. We do not believe that the rule required these plaintiffs to construct the culvert, or to reconstruct the embankment; for that would compel them to do what the appellant had agreed to do. If the rule should be given a construction and application so broad as that claimed by appellant, it would reward the contract-breaker, and punish the party who had paid him the agreed compensation. Judgment affirmed.

Care to
prevent
aggravation
of damages.

HEREFORD

v.

SOUTHERN PACIFIC R. Co.

(Texas Supreme Court, Jan. 31, 1888.)

Railroad Boarding-Train — Road-Master — Money had and received — Estoppel.—In an action against a railroad company for money had and received for plaintiff's use and benefit, it appeared that plaintiff entered into a contract by which the defendant's road-master was to furnish supplies for a boarding-train; that the boarding-train was to be run by plaintiff in the name

of the road-master; that the price of the supplies was to be deducted at the end of each month from the wages of defendant's men; that, after the road-master had been superseded, plaintiff entered into a contract with his successor to run the boarding-train in his own name; and that plaintiff accepted supplies thereafter, knowing them to have been shipped upon the credit of the superseded road-master. *Held*, that plaintiff was estopped from claiming from the railroad company money paid for the supplies shipped after the road-master was superseded, upon such road-master's order.

APPEAL from Jefferson County District Court.

Action against the Southern Pacific Railroad Company to recover moneys had and received by it for plaintiff's use and benefit. The facts are stated in the opinion.

GAINES, J. — This action was brought by appellant to recover the sum of \$339.75, alleged to have been received by appellee for his use and benefit. He testified that in June, 1886, **Facts.** he was employed by one Richard Smith, then road-master of the defendant company, to take charge of the boarding-train on a railroad then being operated by the company. Under the regulations, the road-master had control of the boarding-train, and could board the company's hands himself, or employ some one else to do so. The keeper of the train was entitled to charge the employees fifty cents each per day for board; and at the end of the month this was retained out of their wages for his benefit. The arrangement between appellant and Smith was, that he was to manage the boarding-train for Smith, and to conduct the business in Smith's name. He testified as follows: "I was serving him, and was willing for him (Smith) to draw the money for board then due for that month. I did not consent, however, for him to have the board bills made out in his name, but expected for them to be made out in my name, and that I would sign an order for him to draw the money. At the end of the month of June I learned that he had had the board bills made out in his (Smith's) name, and I did not like it a bit; but I said nothing, as I was owing him, and I was under him as an employee." About the 7th of July, Smith was succeeded as road-master by one Whalen, who continued appellant as keeper of the boarding-train under substantially the same agreement as with Smith, except (as we may infer) that appellant was to manage the business in his own name and upon his own responsibility. Smith, for the defendant, testified the same facts as above stated, except that the board bills were, under his agreement with appellant, to be made out in his (Smith's) name. He also testified that he bought the groceries for the train, of Keller of Houston, and that the board bills for June did not pay them; that, after he ceased to be road-master, appellant ordered supplies of Keller, and that Keller refused to send them upon

appellant's credit ; and that he, the witness, then ordered them forwarded, which was accordingly done. It further appeared that the goods came to hand in the name of Smith, and that appellant received and used them. Keller's manager testified that he would not sell goods to appellant, though he attempted to purchase of him, and that he sent the goods forward on the credit of Smith. So far as we can see from the testimony, all the supplies for July came in this way. At the end of the month, the board bills having been made out and forwarded to the company's officers, this amount was paid Keller, on Smith's order, in settlement of his account for supplies furnished appellant. The latter did not deny that when he received the goods he knew they were marked to Smith, but says he knew they were intended for him, and therefore took them. He must, we think, have known also that the goods were shipped and sold on Smith's credit, and that, having no credit himself, Smith must have had them forwarded, relying upon his right to appropriate the board bills to their payment. Even had Keller shipped the goods in Smith's name without Smith's knowledge, it would have been an act of bad faith on part of appellant, after receiving them, to repudiate the previous arrangement which had been entered into between the parties under his former employment. Clearly, according to appellant's own statement of the contract between him and Smith, the latter had the right to have the bills made out in his own name, and to collect a sufficient amount of them to pay for the supplies. Appellant's statement that he did not consent to this, but expected the bills to be made out in his own name, is inconsistent with his testimony as to the contract. He says, "This train he [meaning Smith] put me in charge of, — to run it and board the hands for him, and in his name." Having, after Smith left, received goods he knew to have been purchased on Smith's credit, he is estopped to deny that the previous arrangement continued so far as it was necessary to enable Smith to protect himself from loss by collecting the board bills.

Plaintiff estopped from claiming company's money.

We do not think it necessary to consider the assignments of error in order. The testimony admitted over the objection of the defendant, taken in connection with the other evidence, tended to show a perfect defence to the action, and was therefore admissible. The court's instructions were not unfavorable to the appellant. Upon the undisputed facts in evidence, the appellee was entitled to a verdict. In such a case, a judgment will not be reversed, although there may be errors in giving or refusing instructions. We do not, however, intend to imply that there are such errors in the record before us. It is not necessary to decide that question, and we do not pass upon it. The judgment is accordingly affirmed.

PEOPLE *ex rel.* NEW YORK, ONTARIO, & WESTERN R. CO. *et al.*

v.

CHAPIN, Comptroller, *et al.*, State Assessors.

(*New York Court of Appeals.*)

Railroad Commissioners — Salaries — Apportionment. — Under the New York Statute of 1882, which provides that the salaries and expenses of the board of railroad commissioners shall be apportioned among the several railroad companies, partly in proportion to net income and partly “in proportion to the length of the main track or tracks on road,” where several tracks are laid between the same points, “the length” is not the quantity of numbers of miles of rail laid, but the distance between the terminal points.

APPEAL from judgment of the Supreme Court.

Denis O'Brien, Attorney-General, for Chapin and others, appellants.

John B. Kerr for respondents.

RAPALLO, J. — We do not deem it necessary to discuss the point raised by the appellants, that their determination complained of was not reviewable on *certiorari*, because we are satisfied that they correctly construed the statute by virtue of which the apportionment of expenses sought to be reviewed was made. Laws 1882, c. 353, sect. 13. That section provides that the salaries and expenses of the board of railroad commissioners shall be borne by the several railroad companies according to their means, to be apportioned by the comptroller and State assessors, who shall assess upon each of said corporations “its just proportion of such expenses, one-half in proportion to its net income for the year next preceding that in which the assessment is made, and one-half in proportion to *the length* of the main track or tracks on road.” The relators contend that where, between two terminal points, there are laid two or more parallel tracks, all of them are main tracks, and that the assessment is to be made, not according to the *length* of those tracks, — that is, the distance between the two terminal points, — but according to the aggregate of the lengths of all the rails laid on all the tracks. The appellants determined that the “*length* of the main track or tracks” meant the distance between two points, i.e., the length of the road; and in this we think they were right. Where several tracks are laid between the same points, and parallel with each

Apportion-
ment of
salaries of
commissioners.

other, the *length* of all must be the same; and length is the quality according to which the apportionment is required to be made, not the quantity or number of miles of rail laid.

It is argued that the use of the terms "main track or tracks" indicates a different intent, and that, if it had been intended that only a single track should be measured, the term "main track" would have been used. We do not think this argument by any means conclusive. Supposing that the statute had exclusive reference to railroads which were operated only between two points, but between those two points some of them had numerous parallel tracks, there would be more force in the argument; yet it would not be conclusive, for, if all those tracks are to be considered as main tracks, it would only be descriptive of the road to speak of the length of its main tracks, and would not indicate that all the lengths of those parallel tracks were intended to be aggregated. But when it is considered, that, although the statute embraced some roads which had only one line, it also embraced other roads which were operated between several different terminal points, in different directions, and that each line had a main track, it is obvious, that, if all of these main tracks were to be included, accuracy of expression required that the terms "length of main track or tracks" should be employed; and their use indicates no intention that any thing but the length of each road, including its several branches and auxiliary lines, if any, should be considered.

The judgment of the Supreme Court should be reversed, and the proceedings of the appellants affirmed, with costs against the relators in both courts.

All concur.

PORTER

v.

RICHMOND & DANVILLE R. Co.

(*North Carolina Supreme Court.*)

Special Policeman — Appointment by Municipality — Salary — Liability. — Where a railroad company requests a city to appoint a special policeman to be assigned to duty at a depot, for its special benefit, and agrees to pay two-thirds of such policeman's salary, and the company for some time after the appointment of such officer pays its proportion of his salary directly to him, such officer may maintain an action against the company for arrears of salary, and need not sue the city therefor.

Same — Employment — Evidence. — In an action by a special policeman against a railroad company to recover arrears of salary, where the defendant

claims that during a certain period plaintiff did not perform the alleged services, and had not been recognized and treated as a special policeman by defendant, a letter delivered to plaintiff during such period by the company's yard-master is admissible, for the purpose of showing that plaintiff was recognized and treated as a policeman in defendant's service during such period, by the agents of defendant at its depot.

APPEAL from Superior Court, Mecklenburgh County.

Action by R. J. Porter against the Richmond & Danville Railroad Company to recover arrears of salary due to him as a special policeman at defendant's depot in the city of Charlotte. The opinion states the case.

Burwall & Walker for plaintiff.

Reade, Busbee, & Busbee for defendant and appellant.

MERRIMON, J. — The complaint alleges: "(1) That on the sixteenth day of May, 1882, at the request of the defendants, he was duly elected special policeman by the board of aldermen of the city of Charlotte, State aforesaid, the said defendants agreeing and promising to pay plaintiff two-thirds of such salary as should be fixed by the said board of aldermen; that the said board of aldermen then and there fixed plaintiff's salary at forty-five dollars per month. (2) That plaintiff served as such special policeman from the said sixteenth day of May, 1882, until the ——— day of May, 1883, on which last-named day, at the request of the defendants, the plaintiff was re-elected to his said office by the said board of aldermen for the term of two years next thereafter; the defendants agreeing and promising to pay plaintiff at the rate of thirty dollars per month for his said services as heretofore. (3) That plaintiff served the defendants as special policeman from said day of May, 1883, to and including the eleventh day of May, 1885; that the defendants paid him for his said services at the rate of thirty dollars per month up to and including the thirty-first day of July, 1884; that said defendants have failed and refused to pay plaintiff salary from said thirty-first day of July, 1884, to May 11, 1885, inclusive, for which said service the defendants are indebted to plaintiff in the sum of two hundred and eighty-one dollars."

The defendant broadly denies these allegations, and alleges as matter of defence as follows: "For a further defence to plaintiff's first cause of action, the defendant says, that, recognizing the necessity for a policeman at its passenger depot in the city of Charlotte, it applied to the board of aldermen of said city for the appointment of a special policeman to be stationed at this defendant's depot in said city, but for no definite length of service, and, as an inducement to that end, agreed with the said city of Charlotte to pay two-thirds of such salary as might be fixed

by said board of aldermen for such policeman, which proposition was accepted, and the plaintiff appointed as such policeman by said board of aldermen; that, as a matter of convenience, this defendant paid the amount of compensation agreed upon directly to the plaintiff, instead of into the treasury of said city; that after the appointment of plaintiff, as aforesaid, he was under the control and authority of the city, and was assigned to duty at this defendant's depot; that this defendant complied with its agreement with the said city of Charlotte, as hereinbefore set forth, until the thirty-first day of August, 1884, when it discovered that the plaintiff was so insufficient and negligent of his duties as such policeman, that it notified both the city authorities and the plaintiff that the plaintiff's services were no longer desired; and this defendant refused to pay any further sum towards his salary, and thereafter the plaintiff never rendered any services to this defendant."

The following is so much of the case settled on appeal as it is necessary to set forth here:—

The plaintiff offered in evidence the records of the board of aldermen of the city of Charlotte, showing the proceedings of the meeting of the said board held Feb. 20, 1882, the material part of which is as follows: Capt. S. S. ^{Plaintiff's evidence.} Pegram, representing the Richmond & Danville Railroad Company, appeared before the board to request that a policeman be appointed, with assignment to special duty of attending at the depot of said road on the arrival of passenger-trains, and stated that the railroad company would consent to pay thirty dollars per month towards the salary of such policeman. On motion of Alderman Schenck, it was ordered that the request be complied with, and that the board proceed to the election of a policeman, who shall be paid forty-five dollars per month, provided that the railroad authorities furnish thirty dollars of said amount; such policeman to be a regular city policeman, subject to the orders of the chief of police of this city, and assigned to special duty at the Richmond & Danville passenger depot, to attend the arrival and departure of all passenger-trains, to be uniformed and equipped as other policemen. Capt. Pegram suggested the name of R. J. Porter as a suitable person for the position, who was thereupon nominated by Alderman Wilkes; . . . and, a vote having been taken, the mayor announced that R. J. Porter had received a majority of the votes, and declared him elected. Mr. Porter, being present, then came forward, and the mayor administered to him the oath of office as a policeman, and he was at once assigned to duty.

The plaintiff next offered in evidence the said records, containing the proceedings of said board of May 12, 1883, as follows:

"At the request of Capt. Gormley, agent of the Richmond & Danville Railroad Company, the board proceeded to elect a policeman for service at the railroad passenger depot, the railroad company agreeing to pay two-thirds of his salary. Alderman Wilkes moved that R. J. Porter be elected, and he was elected unanimously, at the same salary as fixed for the other policemen."

The plaintiff next offers in evidence the charter and ordinances of the city of Charlotte, by which it appeared that policemen were elected for a term of two years; the election of plaintiff, 20th February, 1883, being for an unexpired term, which ended in May, 1883.

The plaintiff introduced one Fred Nash as a witness, who testified that he had been secretary and treasurer of the city of Charlotte from a time long prior to 1882 up to this time; that in 1882, to May, 1883, the salary of a policeman was forty-five dollars per month, and in 1883 it was increased to fifty dollars per month; that the Richmond & Danville Railroad Company never paid any thing to the city on account of Porter's salary; that in 1882, and to May, 1883, the city paid Porter fifteen dollars per month on account of his salary, and, after the salary was raised, paid him twenty dollars per month.

The plaintiff, R. J. Porter, in his own behalf, testified that he entered upon his services as policeman at the depot of defendants when he was first appointed, in February, 1882; that he discharged the duties of a policeman at the depot from that time until in May, 1885; that his name was put on the "pay-rolls" of the Richmond & Danville Railroad Company, and that he was paid by the said company's paymaster every month, just like the other employees of the company; that the Richmond & Danville Railroad Company paid him for his services from February, 1882, until May, 1883, regularly every month, and from the latter time on until the thirty-first day of July, 1884, when the company stopped paying him, and had not paid him for the balance of his term; that the company paid him thirty dollars per month prior to thirty-first day of July, 1884; that he served out his full term to May 12, 1885, and demanded payment of the balance due of the said company, which was refused.

The defendant introduced J. J. Gormley, who testified that he acted as agent for the defendant (the Richmond & Danville Railroad Company) in going before the board of aldermen; that defendants had joint depots; that Porter attended the trains, and kept order, until witness quit the service of the company; that he was agent of both companies.

Mr. Young, for the defendants, testified that he was ticket

clerk for the defendants at their depot in January, 1885, and was at the depot four times in the twenty-four hours; that he did not see Porter there about that time, as he recollected, though he could not say positively that he was not there; that he never saw him there.

W. A. Moody, for the defendant, testified that he had been agent for defendant companies since 1st of August, 1884; that he wrote the letter (marked "A"); that he allowed Porter for his time for August, 1884; that Porter rendered no service, to his knowledge, after August, 1884; that witness was there nearly every day; Porter was on the "pay-rolls" for August, 1884, and was allowed his time, but never paid.

Mr. Kennedy, for defendant, testified that he was "yard despatcher" of defendant companies at their depot in 1884; that Porter never rendered any service to defendant after August, 1884; that he (witness) had orders not to recognize him (Porter) as policeman for the company. Cross-examined, he stated that Porter was there, as usual, after August, 1884, but that witness did not recognize him as serving the railroad company.

The plaintiff, recalled, testified that on or after the fourth day of October, 1884, the witness Kennedy handed him a letter while he was at the depot, acting as policeman. The defendant objected to the introduction of the letter. The plaintiff's counsel thereupon stated (under the rule) that they proposed to prove that Kennedy handed the letter to Porter for the purpose of showing, in contradiction of Kennedy, that Kennedy did recognize Porter as policeman at that time, and also as a circumstance tending to corroborate Porter's statement that he acted as policeman at the depot after August, 1884, and until May, 1885, and not to prove any fact by the contents of the letter. His honor admitted the evidence of the transaction between Kennedy and Porter for the purpose indicated, and the defendants excepted. The plaintiff further testified that Kennedy handed him the letter, and asked him to attend to the matter; that he acted as policeman for defendants at their depot after he received Moody's notice, and had heard of no objection until to-day; that he had a difficulty with Moody before he got the notice.

The defendants requested his honor to charge the jury, (1) that plaintiff is not entitled to recover on his own testimony; (2) that plaintiff is not entitled to recover on all the facts of the case; (3) that, according to the record evidence in the cause, the contract was made with the city of Charlotte by the defendant, and not with the plaintiff, and the plaintiff cannot recover in this action. Instruction.

His honor refused to give these instructions, and, among other things not excepted to, charged the jury that if the defendant

requested the city of Charlotte to appoint a special policeman to be assigned to duty at depot for the special benefit of defendants, and it agreed to pay two-thirds of the policeman's salary, thirty dollars, and plaintiff was appointed as such policeman, and performed the services required of him, he would be entitled to recover of defendant if it made the contract. The defendant excepted to the refusal of the court to give his special instructions, and also excepted to this part of the instructions given. There was a verdict for the plaintiff. The defendant moved for a new trial. Motion overruled. Judgment for the plaintiff. Appeal by defendant.

The letter handed to the plaintiff on the 4th of October, 1884, by the "yard despatcher" of the defendant, was clearly

Letter as evidence of employment.

competent evidence as tending to prove, not the truth of what was said in it, but that the agent of the defendant at and about its depot, where the plaintiff in the course of his employment as policeman was accustomed to be, recognized and treated him as policeman in the service of the defendant, as contemplated by the contract of employment alleged in the complaint. And, moreover, the fact of handing the letter to the plaintiff, and directing him to do service, was evidence corroborative of his testimony, while it tended to contradict the witness who handed it to him.

The defendant was not entitled to the special instruction which its counsel requested the court to give the jury, because,

Action may be maintained directly against company.

if the jury believed the evidence in the view of it contended for by the plaintiff, he was entitled to their verdict. There was evidence tending to prove the contract of employment, and service rendered the defendant in pursuance of it, substantially as alleged in the complaint, while there was evidence introduced by the defendant to the contrary. It was the province of the jury to hear and weigh it all, and determine what part of it they would believe. Nor was the contract in question made by the defendant entirely with the board of aldermen of the town of Charlotte. It was, indeed, a party to it, but so also was the plaintiff in substance and legal effect. The board of aldermen, at the instance of the defendant, agreed to appoint the plaintiff to be policeman, and did so appoint him, to do special police service at and about its depot, and to pay him a fixed part of the compensation agreed to be paid to him, — the defendant as certainly agreeing to pay him another fixed part of it; the plaintiff agreeing on his part to accept the appointment, with its terms, and to do the service required. This seems to us to be the fair practical import and effect of the contract, a sort of arrangement for convenience for the special benefit of the defendant. The

parties so understood and acted upon it. The defendant, understanding that it had agreed to pay the plaintiff a certain part of his salary, placed his name on its "pay-roll," and for a considerable while regularly paid him the compensation it agreed to pay. There is nothing of which we can conceive in the nature of the arrangement and contract that rendered it essential that the plaintiff's wages should go into the hands of the board of aldermen, and thence into his own hands. That would be a useless sort of circumambulation that ill comports with practical business transactions, and it is not surprising that the defendant took this view when this action was brought. Whether the plaintiff did service in pursuance of the contract as alleged by him was a question of fact to be determined by the jury, and this they found in favor of the plaintiff.

The instructions given the jury by the court are substantially correct. Judgment affirmed.

PHILADELPHIA, WILMINGTON, & BALTIMORE R. Co.

v.

DAVIS.

(*Maryland Court of Appeals, Jan. 8, 1888.*)

Surface Water—Obstruction of Flow—Damages.—The owner of the upper land has a right to the uninterrupted flowage of surface waters, and the proprietor of the lower land to which the water descends has no right to arrest such waters, and accumulate them upon the property of his neighbor.

Same—Alteration of Drain—Sufficiency.—If a railroad company closes or alters the accustomed outlet or drain for carrying off surface waters, the substituted or altered outlet must be of sufficient capacity to provide for ordinary rainfalls, etc., but need not be constructed in view of infrequent and extraordinary occurrences which cannot be foreseen and provided against.

APPEAL from Circuit Court, Harford County.

Action to recover damages for the overflowing of plaintiff's premises caused by the alteration of the existing drainage. The facts are stated in the opinion.

Bernard Carter and John F. Donaldson, with David McIntosh, for appellant.

J. L. Ensor and S. A. Williams for appellee.

YELLOTT, J. — An action on the case was instituted by the appellee against the appellant to obtain compensation, by the recovery of damages, for alleged injuries to the plaintiff's property caused by an overflow of surface water resulting from an alteration by the defendant of an existing

Facts.

drainage. The appellee is the owner of a house and lot in Canton, at the north-east corner of Clinton and Boston Streets. The appellant has a line of railroad laid on the bed of Boston Street, which street terminates at its junction with Clinton Street; but the track of the road crosses Clinton Street, and, extending eastwardly, passes the south side of appellee's lot in such close proximity that only a space of a few feet intervenes between the curb of the sidewalk on the south of said lot and a lateral track, leading from the main track of the road into a large open lot north of Boston Street. In 1880, and for more than twenty years anterior to that period, there was a large open gutter or water-channel in which the surface water flowed from the higher ground north and east of the railroad. This gutter extended along the track, passing the south side of appellee's house, and across Clinton Street, and then down Boston Street westwardly, until it discharged the current of water into an open ditch, through which it was carried into the Patapsco River. There is evidence tending to show that this open gutter was of ample capacity to carry off the surface water, and that the appellee sustained no injury from an overflow prior to 1880, when the appellant closed this open gutter along Boston Street, across Clinton Street, and eastwardly to a paved alley in the rear of appellee's house; substituting for said open gutter an iron pipe with an interior diameter of about eighteen or twenty inches. It is also shown by the evidence that the bed of Clinton Street, at the crossing, was raised; that a box drain was put across the tracks on the side of and parallel with Clinton Street; and that across Clinton Street was put a smaller drain covered with iron plates. Into the box drain, and at right angles thereto, was introduced another box drain immediately south of appellee's pavement. It is alleged, and evidence has been adduced tending to show, that these alterations in the drainage lessened the capacity of the outlet for the surface water; so that, whenever there was a copious rainfall, the water accumulated and flowed into the appellee's cellar. The result of this flooding has been a serious injury to the walls of the building, which have been so badly cracked and weakened, that desirable tenants have abandoned the property. To recover damages for the injury thus sustained this action was instituted.

It is observable that this record does not disclose a case where there has been an artificial obstruction interposed so as to produce an interruption or diversion of the current of a permanent stream of water flowing in its ordinary channel. The injury complained of proceeds from an obstruction to the flowage of surface water, which, prior to the alleged wrongful act of the defendant, had

**Obstruction of
flow of surface
water. Con-
flicting deci-
sions.**

found an ample outlet through which it was carried off without any damaging consequences to the property of coterminous proprietors. In considering questions thus arising, we encounter some diversity and conflict in the reported decisions. In Massachusetts and some other States, it has been held that the owner of land may lawfully prevent surface water from coming upon it, although, in so doing, the water may be made to flow upon adjoining land, and cause loss and injury to coterminous proprietors. *Gannon v. Hargadon*, 92 Mass. 106; *Dickinson v. Worcester*, 89 Mass. 19; *Buffum v. Harris*, 5 R. I. 243.

But in most of the States this doctrine does not seem to have been sanctioned by adjudication. In a case very recently decided by the Vice-Chancellor of New Jersey, it was emphatically said that "the broad doctrine, declared by some courts, that no right of any kind can be claimed in the flow of surface water, and that neither its retention, division, repulsion, or altered transmission will constitute an actionable injury, has never been adopted, in all its length and breadth, in this State." *Field v. West Orange*, 36 N. J. Eq. 118, 37 N. J. Eq. 600.

The prevailing doctrine in this country seems to be, that the owner of the upper land has a right to the uninterrupted flowage of the water caused by falling rain and melting snow, and that the proprietor of the lower land, to which the water naturally descends, has no right to make embankments whereby the current may be arrested and accumulated on the property of his neighbor. Same. Upper proprietor's right to uninterrupted flowage.

This is the rule of the civil law, apparently founded on the principles of justice, and said to be "received with constantly increasing favor in the United States." *Crawford v. Rambo*, 44 Ohio St. 279; *Martin v. Riddle*, 26 Pa. 415; *Porter v. Durham*, 74 N. C. 767; *Butler v. Peck*, 16 Ohio St. 336; *Ogburn v. Connor*, 46 Cal. 346.

The principle established by these authorities seems to sanction the doctrine, that if the water is allowed to flow without artificial obstruction, and the current encounters a natural obstruction caused by the elevation of the earth's surface at the boundary line, the proprietor of the upper land has no right to demand an outlet of his neighbor, nor is the latter liable for any injury caused by the accumulation of the water; for it would be absurd to say that a man can be sued for damages caused by the operation of natural laws not put in motion by his own instrumentality. But every man is responsible for injuries resulting to others from his own acts not sanctioned by legal principles. So, if for the purpose of constructing a railroad, or for any other purpose, it becomes necessary to erect an embankment, a proper outlet or culvert must be provided of ample capacity to carry

off the flow of water so that it may not be obstructed, and thus accumulated on the upper and adjacent lands of other persons; for, as regards coterminous estates, no one can legally assume the right to alter the condition of things so as to injuriously affect the pre-existing rights of his neighbor. The outlet must, therefore, be carefully and skilfully constructed, so that no damage may result to contiguous property.

In *Harrison v. Great Northern Railway Company*, 3 Hurl. & C. 231, Pollock, C. B., said, "They are bound to maintain a sufficient cut or depth. The sufficiency of a cut depends on its depth, width, fall, and outlet, as compared with the water likely to be in it. Now, in this case, the cut was not sufficient to hold the water likely to be in it, owing to the condition of the outlet.

The rule is, that the outlet must be of ample capacity to carry off all the water likely to be in it. But the rule is not appli-

Extraordinary rainfalls. cable to an extraordinary and excessive rainfall, which is held to be *vis major*. Such unfrequent

and extraordinary occurrences cannot be foreseen and provided against, and for damages caused by them no one is responsible. Recognizing and adopting this principle, the Supreme Court of Texas, in an action to recover for injuries caused by the construction of insufficient culverts in the defendant's railroad embankment, *held*, that "if the overflow was of such an extraordinary character that railroad engineers of ordinary care and prudence in the construction of the embankment and culverts could not reasonably be expected to have anticipated and provided against it, the railroad was not liable."

Gulf, C. & S. F. R. Co. v. Pomeroy (Texas), 30 Am. & Eng. R. R. Cas. 200. With this exception in relation to extraordinary floods, the rule is as already stated. And it is held, that where,

Duty of municipalities. in some particular locality, a municipal corporation is under no obligation to construct drains or culverts so as to protect the property of individuals, or

to provide means for carrying off surface water, yet if it does construct them, and the work is performed in a negligent or unskilful manner, or if negligent in the management of them, it is liable in damages. *Seifert v. Brooklyn*, 14 Am. & Eng. Corp. Cas. 440; *Gilluly v. City of Madison*, 63 Wis. 518; *Henderson v. Minneapolis*, 32 Minn. 319; *Allen v. Chippewa Falls*, 52 Wis. 430. In *Johnston v. District of Columbia*, 118 U. S. 19 (30 L. ed. 75), Gray, J., said that "the construction and repair of sewers according to the plan adopted are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality who has constructed and owns the sewer may be sued by a person whose property is thereby injured."

In the case now under consideration the appellant undertook to alter the established outlet through which the surface water was carried away. It was incumbent on the corporation to have this work done in a careful and skilful manner. If done carelessly and negligently, so that, as a consequence, injury to the plaintiff ensued, an action for damages is maintainable. The facts in evidence, relating to the manner in which the work was done, were considered and passed upon by the jury, guided and enlightened, in relation to the legal principles applicable to the evidence believed by them to be true, by the instructions emanating from the court. The rulings of the court on the instructions asked for present the questions now to be determined.

Duty of
company in
present case.

The plaintiff offered but one prayer, which was granted ; and to this ruling the defendant excepted. In this instruction the jury are told that if they believe from the evidence that the defendant closed the open trench or gutter, and raised the bed of Clinton Street, and that the closing of the gutter and raising the bed of the street caused such water as usually flowed through said gutter to dam and overflow the plaintiff's premises, and that such damage and overflow would not have occurred but for the closing of said gutter and raising the bed of said street, and that the plaintiff's house was injured by such overflow, then they must find their verdict in favor of the plaintiff. In other words, the jury were told that if they believed, from the facts offered in evidence, that the property of the plaintiff was injured, and that the injury was caused by the act of the defendant in closing the usual outlet for the surface water, raising the bed of the street, and constructing another outlet of insufficient capacity to carry the water likely to be in it, the defendant was liable. This instruction was tantamount to saying that the defendant was liable for injuries resulting from its own unskilfulness or negligence, and there was no error in granting it.

Instructions
given.

The defendant offered ten prayers, two of which were rejected, and another granted with modifications made by the court. To the rejection of these two prayers, and to the granting of the other as modified, exceptions have been taken. The fourth and fifth prayers of the defendant were properly rejected. The fourth prayer presents the proposition, "that there is no legally sufficient evidence in this case that the defendant changed the natural direction of the drainage at or near the plaintiff's premises." This is repeated in the fifth prayer, with the addition that there is no legally sufficient evidence that the defendant ever diminished or decreased the carrying capacity of any of the drains, except the drain across Clinton Street.

An analysis of the evidence in relation to alterations in the drainage would lead to useless prolixity; and it is sufficient to say, that there is proof in abundance, offered on the part of the plaintiff, tending to show that there have been changes in the mode and direction of the drainage, and that the present plan of drainage adopted by the defendant is insufficient to carry off the currents of water. The court could not have granted these two prayers relating to the legal insufficiency of the evidence, because, each being in the nature of a demurrer to evidence, the truth of the evidence must have been assumed.

The ninth prayer of the defendant reads thus: "That if the jury shall believe from the evidence that the original construction of plaintiff's house, or alterations made in it by plaintiff, or the changes naturally incident to a house such as that of the plaintiff, or any of them, was sufficient to cause the injuries to the house, such as have been testified to, then, under the pleadings in this case, the plaintiff is not entitled to recover."

This prayer was modified by the addition of the following words: "unless the jury, after taking into consideration all the facts and circumstances of the case as testified to by the witnesses (including such defective construction and changes, if the jury shall so find), shall determine from a preponderance of testimony that the injuries complained of were occasioned by the acts of the defendant, as set forth in the plaintiff's first prayer."

It will be observed, that the prayer as offered did not put it to the jury to find that the original construction or the alterations in the house did actually cause the injury which forms the foundation for this action. The prayer as presented tended to mislead the jury. Moreover, in this case there was another independent and efficient cause which might have been productive of the injury, and the court very properly modified the instruction so as to bring that cause under consideration by the jury. *Balt. & Potomac R. R. Co. v. Reaney*, 42 Md. 136.

Finding no error in any of the rulings of the learned judge in the court below, the judgment should be affirmed.

Judgment affirmed.

Surface Waters. — The decisions of the various courts of the several States concerning surface waters show an irreconcilable difference of opinion. In a number of States the courts have adopted what is known as the common-law rule, while in others what is called the civil-law rule has been followed. Referring to the origin of this difference, the Supreme Court of Missouri say, in the case of *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo. 237; s. c., 5 Am. & Eng. R. R. Cas. 64; 36 Am. Rep. 480, "This difference may be traced to the great importance attached by the courts on one side to the maxim, *Sic utere tuo, ut alienum non lædas*; whilst those adopting a contrary view seem disposed to give unlimited effect to the maxim, *Cujus est solum, ejus est usque ad cælum*, and therefore to leave every proprietor to take care of himself, except where streams are concerned."

Common-Law Rule.—The common-law rule was stated by the Massachusetts Supreme Court in the case of *Gannon v. Hargadon*, 92 Mass. (10 Allen) 106, 109, in the following terms: "The right of an owner of land to occupy and improve it in such manner and for such purpose as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface, or flowing on it from the surface of adjoining lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. . . . *Cujus est solum, ejus est usque ad cælum* is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any consideration of injury to other land which may be occasioned by the flow of more surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment; nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface waters by preventing it from going within the limits of his land, or by erecting barriers, or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface waters or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil." This rule has been adopted in the following States:—

Connecticut.—*Adams v. Walker*, 34 Conn. 466; *Gillett v. Johnson*, 30 Conn. 180; *Wadsworth v. Tillotson*, 15 Conn. 366; s. c., 39 Am. Dec. 391.

Indiana.—*Cairo & V. R. Co. v. Stevens*, 73 Ind. 278; s. c., 38 Am. Rep. 139; *Schlichter v. Phillipy*, 67 Ind. 201; *Taylor v. Fickas*, 64 Ind. 167; s. c., 31 Am. Rep. 114.

Kansas.—*Kansas City & E. R. Co. v. Riley*, 33 Kans. 374; s. c., 20 Am. & Eng. R. R. Cas. 116; *Gibbs v. Williams*, 25 Kans. 214; s. c., 37 Am. Rep. 241; *Atchison, T. & S. F. R. Co. v. Hammer*, 22 Kans. 763; *Palmer v. Waddell*, 22 Kans. 352.

Maine.—*Murphy v. Kelley*, 68 Me. 521; *Morrison v. Bucksport & B. R. R. Co.*, 67 Me. 353; *Greeley v. Maine Cent. R. R. Co.*, 53 Me. 200; *Bangor v. Lansil*, 51 Me. 521.

Massachusetts.—*Jackman v. Arlington Mills*, 137 Mass. 277; *Rathke v. Gardner*, 134 Mass. 14; *Macomber v. Godfrey*, 108 Mass. 219; *Emery v. Lowell*, 104 Mass. 13; *Bates v. Smith*, 100 Mass. 181; *Curtis v. Eastern R. Co.*, 96 Mass. (14 Allen) 55; *Franklin v. Fisk*, 95 Mass. (13 Allen) 211; *Gannon v. Hargadon*, 92 Mass. (10 Allen) 106; *Dickinson v. Worcester*, 89 Mass. (7 Allen) 19; *Flagg v. Worcester*, 79 Mass. (13 Gray) 601; *Parks v. Newburyport*, 76 Mass. (10 Gray) 28; *Ashley v. Wolcott*, 65 Mass. (11 Cush.) 192.

New Hampshire.—*Swett v. Cutts*, 50 N. H. 376; s. c., 9 Am. Rep. 276.

New York.—*Barkley v. Wilcox*, 86 N. Y. 140; s. c., 40 Am. Rep. 519; *Lynch v. Mayor*, 76 N. Y. 60; s. c., 32 Am. Rep. 271; *Gould v. Booth*, 66 N. Y. 62; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Cohocton Stone R. v. Buffalo, N. Y. & E. R. R.*, 51 N. Y. 573; *Curtiss v. Ayrault*, 47 N. Y. 73; *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214; *Pixley v. Clark*, 35 N. Y. 532; *Brown v. Bowen*, 30 N. Y. 538; *Goodale v. Tuttle*, 29 N. Y. 459; *Bellinger v. New York Cent. R. R.*, 23 N. Y. 42; *Waffle v. Porter*, 61 Barb. (N. Y.) 130; *Waffle v. New York C. R.*, 58 Barb. (N. Y.) 413; *Trustees v. Youmans*, 50 Barb. (N. Y.) 316; *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Sleight v. Kingston*, 11

Hun (N. Y.), 594; *Wagner v. Long Island R. Co.*, 2 Hun (N. Y.), 633; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; s. c., 7 Am. Dec. 526.

Rhode Island. — *Wakefield v. Newell*, 12 R. I. 75; s. c., 34 Am. Rep. 598; *Buffum v. Harris*, 5 R. I. 253.

Vermont. — *Beard v. Murphy*, 37 Vt. 104; *Chatfield v. Wilson*, 28 Vt. 49.

Wisconsin. — *Lessard v. Stram*, 62 Wis. 112; s. c., 51 Am. Rep. 715; *Hanlin v. C. & U. W. R. Co.*, 61 Wis. 515; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis. 530; s. c., 5 Am. & Eng. R. R. Cas. 82, 38 Am. Rep. 753; *Allen v. Chippewa Falls*, 52 Wis. 434; s. c., 38 Am. Rep. 748; *Eulrich v. Richter*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Hoyt v. Hudson*, 27 Wis. 656; *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50.

Civil-Law Rule. — Under what is known as the civil-law rule, the owner of the higher land has a servitude or natural easement upon the lower adjoining land for the discharge of all surface waters flowing naturally thereon from the higher land, and the owner of the lower land cannot prevent or obstruct the natural passage of such water to the injury of the higher land. The grounds upon which this rule rests are given in the case of *Martin v. Riddle*, 29 Pa. St. 415, in which the court said, "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arising from this position is usually more than compensated by other circumstances: hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper grounds shall be stopped, nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel, waters usually flowing off into his neighbors' fields by several channels, and thus increase the waste upon the lower fields." And in the case of *Kauffman v. Griesemer*, 26 Pa. St. 407, 413; s. c., 67 Am. Dec. 437, it was remarked, that "almost the whole law of water courses is founded in the maxim of the civil law, *aqua currit et debet currere ut currere solebat*. Because water is descendible by nature, the owner of the dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or fall upon the superior." The rules set out in these two cases have been adopted in the following States; to wit, —

Alabama. — *Farris v. Dudley*, 78 Ala. 124; s. c., 56 Am. Rep. 24; *Crabtree v. Baker*, 75 Ala. 91; s. c., 51 Am. Rep. 424; *Nininger v. Norwood*, 72 Ala. 277; s. c., 47 Am. Rep. 412; *Hughes v. Anderson*, 68 Ala. 280; s. c., 44 Am. Rep. 147.

California. — *Ogburn v. Connor*, 46 Cal. 346; s. c., 13 Am. Rep. 213.

Illinois. — *Peck v. Herrington*, 109 Ill. 611; s. c., 50 Am. Rep. 627; *Gormley v. Sanford*, 52 Ill. 158; *Gilham v. Madison County R. Co.*, 49 Ill. 484; *Nevins v. City of Peoria*, 41 Ill. 502.

Iowa. — *Bartle v. City of Des Moines*, 38 Iowa, 414; *Simpson v. Keokuk*, 34 Iowa, 568; *Russell v. Burlington*, 30 Iowa, 262; *Ellis v. Iowa City*, 29 Iowa, 229; *Livingston v. McDonald*, 21 Iowa, 160.

Louisiana. — *Lattimore v. Davis*, 14 La. 161; s. c., 33 Am. Dec. 581; *Martin v. Jett*, 12 La. 501; s. c., 32 Am. Dec. 120; *Minor v. Wright*, 16 La. An. 151; *Hooper v. Wilkinson*, 15 La. An. 497; s. c., 77 Am. Dec. 194.

Maryland. — *Philadelphia, W. & B. R. Co. v. Davis*, *ante*.

Michigan. — *Boyd v. Conklin*, 54 Mich. 583.

North Carolina. — *Porter v. Durham*, 74 N. C. 767; *Overton v. Sawyer*, 1 Jones (N. C.), L. 308; s. c., 75 Am. Dec. 444.

Ohio. — *Tootle v. Clifton*, 20 Ohio St. 247; s. c., 10 Am. Rep. 732; *Butler v. Peck*, 16 Ohio St. 334; *Crawford v. Rambo*, 44 Ohio St. 279.

Pennsylvania. — Hays *v.* Hinkleman, 68 Pa. St. 324; Martin *v.* Riddle, 26 Pa. St. 415; Kauffman *v.* Griesemer, 26 Pa. St. 407; s. c., 67 Am. Dec. 437.

Tennessee. — Louisville & N. R. Co. *v.* Hays, 11 Lea (Tenn.), 382; s. c., 14 Am. & Eng. R. R. Cas. 284; Carriger *v.* East Tennessee & V. R. Co., 8 Lea (Tenn.), 388.

Modified Doctrine. — *In Arkansas* the court, in the case of Little Rock & F. S. R. Co. *v.* Chapman, 39 Ark. 463; s. c., 43 Am. Rep. 280, repudiated the civil-law rule purely as such, and also the common-law rule in its utmost rigidity, and expressed preference for a rule under which each case would be decided upon its merits, with a reasonable regard at once to the right of the lower owner to ward off surface waters from his premises, and of the maxim, *sic utere tuo, ut alienum non lædas*.

In South Carolina. — In Waldrop *v.* Greenville, L. & S. Ry. Co. *post*, the South Carolina court has, in an opinion *obiter*, expressed its preference for the rule as laid down in Arkansas court.

Conflicting Decisions. — *In Missouri.* — In Missouri the court in their earlier decisions followed the common-law rule (see Munkers *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 334; s. c., 72 Mo. 514; 5 Am. & Eng. R. R. Cas. 79; Hoshier *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 329; McCormick *v.* Kansas City, St. J. & C. B. R. Co., 57 Mo. 433), but departed therefrom in two subsequent cases, and announced their preference for the civil-law rule. See Shane *v.* Kansas City, St. J. & C. B. R. Co., 71 Mo. 239; s. c., 5 Am. & Eng. R. R. Cas. 64, 36 Am. Rep. 480; McCormick *v.* Kansas City, St. J. & C. B. R. Co., 70 Mo. 359; s. c., 35 Am. Rep. 43. In the later cases it has, however, reverted to the common-law rule, originally sanctioned by them. See Benson *v.* C. & A. R. R. Co., 78 Mo. 504; Stewart *v.* City of Clinton, 70 Mo. 603. And in the case of Abbott *v.* Kansas City, St. J. & C. B. R. Co., 83 Mo. 271; s. c., 20 Am. & Eng. R. R. Cas. 103; 53 Am. Rep. 481, it expressly overruled the decisions which follow the civil-law rule.

In New Jersey. — In New Jersey the only decision directly in point adopts the common-law rule. See Bowlsby *v.* Speer, 31 N. J. L. (2 Vr.) 352. But in the case of Field *v.* West Orange, 36 N. J. Eq. (9 Stew.) 118; s. c., 27 N. J. Eq. (12 C. E. Gr.) 600, the vice-chancellor said, "The broad doctrine declared by some courts, that no right of any kind can be claimed in the flow of surface water, and that neither its retention, diversion, repulsion, nor altered transmission will constitute an actionable injury, has never been adopted in all its length and breadth in this State."

Obiter Dicta. — *In West Virginia.* — In this State there are no decisions bearing directly upon the point; but in Gillison *v.* Charleston, 16 W. Va. 284, 303, the court, after an examination of the authorities, say, "A part of the authorities we have cited seem to recognize the principle that individuals and municipal corporations have the right to dispose of surface water in any manner they please, to prevent its flow over adjoining land upon their premises, although the result may be to flood the adjoining land, or expel it, throw it upon the lands of their neighbors, and in either case are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics, as well as law, that a man may use his own property in any manner he pleases, providing he does not thereby interfere with the rights of his neighbor."

Statutory Provisions. — *In Texas.* — In Texas there has been no decision upon the point, but in the case of railroads there is a statute of that State which provides that railroads shall be liable for any obstruction in the flow of surface waters. See Gulf, Colorado, & S. F. R. R. Co. *v.* Helsley, 62 Tex. 593; s. c., 20 Am. & Eng. R. R. Cas. 89.

OLSON

v.

ST. PAUL, MINNEAPOLIS, & MANITOBA R. CO.

(Minnesota Supreme Court, May 14, 1888.)

Surface Water — **Railroad Ditch** — **Discharge.** — A railroad company has no right, by means of a ditch, to turn the surface waters accumulating upon its own land, upon the land of another where they would not otherwise go.

APPEAL from District Court, Clay County.

Action by Martin Olson against the St. Paul, Minneapolis, & Manitoba Railway Company, to recover damages for injuries to crops caused by the defendant company negligently diverting surface waters upon his lands. The railroad company built a ditch about three miles in length, at a right angle from ditches excavated parallel to and upon each side of its road-bed. By means of the long ditch, it was alleged surface waters were collected, carried in the direction of plaintiff's farm lands, and then turned out so as to reach his land in such quantities, and for such a period of time, as to destroy his crops.

The District Court rendered judgment for plaintiff, whereupon defendant appealed.

M. D. Grover for appellant.

O. Mosness for respondent.

GILFILLAN, C. J. — We have carefully examined the evidence in this case, and find there is sufficient to sustain the findings of fact of the court below. Those findings bring the case within the rule laid down in *Hoganson v. Railway Co.*, 31 Minn. 224; s. c., 14 Am. & Eng. R. R. Cas. 291.

The defendant, however, claims that, under section 3 of its charter, — to wit, subchapter 1 of chapter 1 of the Acts passed at the extra session of 1857, — it had authority to construct the ditch which discharged the waters so that they flowed upon plaintiff's land, and destroyed his crops. That section reads, "Said corporation shall have the right to enter upon any lands for the purpose of making surveys and for a right of way; may appropriate to its sole use and control, for the purposes contemplated herein, land

¹ SURFACE WATERS. — For a full discussion of the doctrines of surface waters, see *ante*, Philadelphia, W. & B. R. Co. *v.* Davis, 143, and note 148.

not exceeding two hundred feet in width throughout the entire line of its said railroad; may enter upon, take possession of, and use all and singular any lands, streams, and materials of every kind beyond the width of two hundred feet, for the location of depots, station-grounds, and houses, for the purpose of constructing bridges, dams, embankments, excavations, spoil-banks, terminals, engine-houses, shops, and other buildings necessary for the constructing, completing, altering, maintaining, preserving, and complete operation of said railroad. All such lands, waters, materials, and privileges belonging to the Territory or future State of Minnesota are hereby granted to said corporation for said purposes, and this Act shall be sufficient notice to all persons claiming an interest in the same. But lands owned or belonging to any person, company, or corporation may be taken and appropriated for the purposes aforesaid, and shall be valued and paid for in the manner hereinafter provided." It would certainly be a very large construction to hold, that, under this language, the defendant could enter upon and appropriate (even upon making compensation) the lands of private persons, and dig a ditch three miles long, at right angles to its line of railroad, for the purpose of carrying off the water accumulating along by the sides of the embankment for its road-bed.

No right to
discharge sur-
face water.

But, conceding that it had the right to dig the ditch to the full extent that it would have if it owned the land in fee, still it would not have the right, by means of it, to turn the waters accumulating on its own land upon the land of another, where they would not otherwise go. The decision referred to did not proceed upon the theory that the defendant committed any trespass or wrong by the mere act of digging the ditch, but assumed that it was dug on its own land. It is not found that plaintiff was the owner of the land, the crops on which were damaged by the water being turned upon it, but he was in possession; and that, it being presumed to have been rightful, was sufficient to enable him to maintain an action for damages to the crops. Order affirmed.

OLSON

v.

ST. PAUL, MINNEAPOLIS, & MANITOBA R. CO.

(Minnesota Supreme Court, June 1, 1888.)

Surface Waters — Damming back — Overflow — Liability. — A railroad company, in order to carry off the surface water from its road-bed, constructed a ditch about three miles in length, running at right angles from ditches excavated parallel to and upon each side of the road-bed. The owner of the lands upon which such ditch terminated obtained a judgment against the company for damages for injuries to his crops. Thereupon the railroad company, deeming the ditch to be a nuisance, closed it by building a dam at the point upon its right of way where it intersected one of the parallel ditches, causing an overflow in the latter, whereby the lands of the plaintiff in the present action were inundated, and his crops ruined. It appeared that the company had solicited and obtained from plaintiff the right to excavate the ditch across his land, representing that it would drain and greatly benefit it; that verbal permission was given, whereupon it built the ditch, using a strip of land about sixteen feet wide and about half a mile long; and that plaintiff's lands were drained and greatly benefited by the ditch, as represented. *Held*, that the company having formed the ditch across the plaintiff's land under a simple verbal license revocable at pleasure, and having no easement authorizing it to maintain it there, it was not obliged to continue to keep the ditch in use, and that it was not liable to the plaintiff for damages to his crops caused by the simple act of closing the ditch upon the company's own land, whereby, — by reason of the contour of the ground, — surface waters, the overflow of the parallel ditches, made their way across plaintiff's farm substantially as they would do in their natural course, were the ditches not in existence.

APPEAL from District Court, Clay County.

Action by Ole A. Olson, to recover damages for injuries to land and crops by overflow, caused by the action of the defendant, the St. Paul, Minneapolis, & Manitoba Railway Company, in damming up a ditch constructed across plaintiff's land. Plaintiff appeals from a judgment for the defendant. The facts sufficiently appear in the opinion.

O. Mosness for appellant.

M. D. Grover and *W. E. Smith* for respondent.

COLLINS, J. — This case may well be denominated as the opposite of that decided at this term, wherein one Martin Olson is plaintiff, in which this defendant, a railroad corporation, was compelled to respond in damages for maintaining a ditch some miles in length, built at a right angle from ditches excavated parallel to and upon each side of its road-

Facts.

bed ; by means of which it was alleged that surface waters were collected, carried in the direction of said Olsen's farm lands, and then turned out so as to reach his farm in such quantities and for such a long period of time as to destroy his crops. In this case the plaintiff's right of action is based upon the fact, that, discovering it to be a nuisance, the defendant closed the long ditch, before mentioned, by building a dam therein at the point upon its right of way where it intersected one of the parallel ditches, causing an overflow in the latter, whereby the lands of plaintiff near by were inundated and his crops ruined ; and upon the further facts that defendant solicited of plaintiff the right to excavate said long ditch across his land, representing that it would drain and greatly benefit it ; that verbal permission was given defendant, whereupon it built the ditch, using a strip of plaintiff's land about sixteen feet wide and one-half mile long ; that the lands of plaintiff were drained and greatly benefited by the ditch, as represented, — upon which facts he relied and acted when planting the crops said to have been destroyed. As stated, the long ditch had been declared a nuisance when open ; and we are now called upon to hold that defendant had no right to abate the nuisance by closing it upon its own premises, at a point and in a manner which will effectually prevent the further improper precipitation of the waters which may accumulate along its road-bed in the parallels, thence flow into the long ditch, and through that, to the detriment of land-owners below its terminal. Should we be so compelled to hold, the defendant would be placed in a most uncomfortable predicament. The appellant (plaintiff) insists that the fourth finding of fact, as made by the trial court, is entirely out of the record, not justified by the pleadings, nor warranted by any testimony properly before it upon this hearing. The finding, concisely stated, is, that the long ditch is a nuisance, and, when open, flooded the lands below its mouth, to the damage of their owners. It seems, that, prior to the trial of the case at bar, several actions in which the respondent was defendant, of the same nature of the one herein mentioned, had been arbitrated, tedious hearings had, much testimony taken and reduced to writing. It was herein stipulated that said testimony, "so far as applicable under the pleadings," should be read, and upon such testimony and other stipulated matters the case should be tried. It must be admitted that there is no allegation in the pleadings under which testimony tending to warrant the finding could be introduced, if reasonably objected to ; but it does not follow that there was not offered, read, and received without protest, and possibly by consent, abundant testimony upon the point covered by the finding. The testimony taken by the arbitrators, and used upon this hearing by stipulation, is not presented to us

as a part of this record, and we cannot infer that any part of it was improperly received or considered, or that the finding is not fully justified by evidence introduced without objection. The presumption is, that the fact embraced in the finding was properly litigated at the trial, and is sustained by competent testimony. *Jones v. Wilder*, 28 Minn. 238. We gather from appellant's brief his concession that the evidence before the arbitrators was ample to warrant such a finding of fact, but that the court should have wholly ignored it. This would have imposed upon the court the labor of closely scrutinizing many folios of written evidence, extracting such as might be clearly admissible in the case at bar, and rejecting the balance, without the aid or suggestion of counsel.

If in this testimony there was much that was inadmissible under these pleadings (as is now asserted), the obligation rested upon counsel — not on the court — to discover it, and by timely interference prevent its consideration. There was no contract between these parties, even by parol. The findings of the court show that plaintiff permitted the defendant to enter upon his land, and make an excavation, which the latter represented would be of benefit to the plaintiff, increasing the productiveness of his land. Not a single element of a binding contract existed; it was simply a license to perform certain acts — authority for whatever might be done within its terms, but revocable at pleasure. The right to maintain the ditch is an easement which can only be acquired by grant or prescription. See *Johnson v. Skillman*, 29 Minn. 95, in which the cases are collated and thoroughly reviewed. As the defendant obtained no easement upon plaintiff's land, is wholly without authority to maintain the ditch thereon, has no remedy should its further enjoyment be forbidden, it must follow that it is not obliged to continue or keep it in use. Nor can it be compelled to compensate plaintiff for damages to his crops caused by its simple act of closing the ditch upon its own land, whereby, by reason of the contour of the ground, surface waters — the overflow of the parallel ditches — make their way across plaintiff's farm substantially as they would do in their natural course, were the ditches not in existence. We deem it unnecessary to say more, save that the doctrine of estoppel *in pais* has no application here, and that there has been no violation of sect. 60, c. 124, Gen. St. 1878. Judgment affirmed.

Surface Waters. — For a full discussion of the civil and common law doctrines in regard to surface waters, see *Philadelphia, W. & B. R. Co. v. Davis*, *ante*, 143, and note 148.

Damming Back Water. — See *post*, *Sabine & E. Tex. R. Co. v. Wood*.

Action for Damages — Limitations. — In the case of Hatch *v.* Keokuk & D. M. R. Co., decided by the Supreme Court of Iowa June 8, 1887, an opening was made in an embankment, near where the surface water formerly found its outlet, at the request of the proprietor of the lands adjoining on each side of the track, but was designed simply as a cattle passage, and not as an outlet for water. In an action against the railroad company for causing the surface water to overflow plaintiff's ground situated at some distance from the road-bed, *held*, that an action would lie against the company as for a failure to maintain a sufficient outlet for water, but that the embankment must be treated as a solid, permanent structure; that plaintiff's right of action accrued when the embankment was made, or as soon as it was discovered that it injured plaintiff's lands; and that the statute of limitations commenced to run from such time.

In this case the appellate contended, that "if the embankment had been solid throughout, so as to necessarily prevent the passage of the water, then the injury would have been permanent, and the damages entire, and would have been done at the time the embankment was put in. But the embankment was not solid. An opening was made in the embankment near where the water formerly found its outlet; but the defendant neglected to make and keep it sufficient, when defendant could have made the outlet sufficient at a reasonable expenditure. The injury was the neglect to make the outlet sufficient, and there is no presumption that this neglect would continue. If the defendant had furnished no passage whatever for the water, it would have presented a different question."

The court say, "Now, this reasoning would be a sufficient answer to the position of appellant if the defendant did in fact attempt to make a water-way through its embankment. If such was the fact, the case would probably be within the rule announced in Drake *v.* Chicago, R. I., etc., R. Co., 63 Iowa, 302; s. c., 19 N. W. Rep. 215. But the evidence shows, without contradiction, that, when the railroad was constructed, one Adam Hine was the owner of the land through which it was built. He owned the land on both sides of the right of way; and at his instance, and by his procurement, the company put in piling, and laid the track upon trestle-work for a sufficient space to allow cattle to pass from one field into the other. It was not designed as an outlet for water, was not adapted to that purpose, and the proof shows that it is not practicable, by excavation, to make a water-way of it. It appears to us that the undisputed facts of the case bring it fully within the rule of the cases of Stodghill *v.* Chicago, B., etc., R. Co., 53 Iowa, 341; and Van Orsdel *v.* Burlington, C. R. & N. R. Co., 56 Iowa, 470."

HANNIBAL & ST. JOSEPH R. Co.

v.

MISSOURI RIVER PACKET Co.

(United States Supreme Court, March 19, 1888.)

Railroad Bridge — Measurement of Span — Navigable River. — Under the Act of Congress of July 25, 1886, authorizing the construction of a bridge across the Missouri River at Kansas City, but providing that such bridge, if a draw-bridge, shall be built "with spans of not less than 160 feet in length in

the clear on each side of the central or pivot pier of the draw, and the pier of said bridge shall be parallel with the current of the river," the distance of the spans must be obtained by measuring along a line between the piers, drawn perpendicularly to the faces of the piers and the current of the river; and a bridge measuring less than 160 feet between the piers, so calculated, although having a span of 160 feet measuring along the line of the bridge, is not a lawful structure.

Same — Jurisdiction of United States Supreme Court — Federal Question. — The fact that a State court decided, in an action for damages sustained by vessels in navigating the Missouri River, that a railroad bridge across such river had not been built as required by the Act of Congress authorizing its construction, rendered the railroad companies liable, irrespective of the question whether the improper construction caused the accident, does not present any federal question for the consideration of the United States Supreme Court.

ERROR to the Supreme Court of the State of Missouri.

Action to recover damages for injuries sustained by plaintiff's vessels while navigating the River Missouri, in consequence of the improper construction of a bridge belonging to the defendant. The opinion states the case.

Wirt Dexter and John J. Herrick for plaintiff in error.

Sanford B. Ladd and John C. Gage for defendant in error.

LAMAR, J. — This is a writ of error to the Supreme Court of the State of Missouri to review a judgment of that court (20 Am. & Eng. R. R. Cas. 275) affirming a judgment of the Circuit Court of Jackson County in said State against the plaintiff in error. The action was brought in February, 1875, in the Circuit Court of Jackson County, by the Missouri River Packet Company, plaintiff below, against the Hannibal & St. Joseph Railroad Company, defendant below, to recover damages for injuries done to two of the plaintiff's steamboats by a railroad bridge, which had been erected and maintained by defendant over the Missouri River at Kansas City, Mo., the piers of which, and two certain structures connected therewith, it is alleged unlawfully obstructed the navigation of said river. The petition contained two counts, the first of which was as follows: "Plaintiff states that it is, and for the five years last past has been, a corporation organized and created under and by virtue of the laws of the State of Missouri, and during said period has been and still is the owner and proprietor of numerous steamboats, including the steamboat named 'Alice,' hereinafter mentioned, with which it has, as such corporation, during said period been engaged in navigating the waters of the Missouri River, and conveying and transporting by means thereof passengers and freight between the various towns and cities situated on the banks of said river in the States of Missouri and Kansas. That the defendant is, and for the last

**Facts and
pleadings.**

twenty years has been, a railroad corporation organized under and by virtue of the laws of the State of Missouri. That the Missouri River, for a long distance above the City of Kansas, in the county of Jackson and State of Missouri, and below said city to the mouth of said river, is a navigable stream; that prior to the fourth day of March, 1874, the defendant had erected, and prior thereto and on said day did keep and maintain, in the said river and the channel thereof, near the southern bank thereof, and near the foot of the street known as Broadway, in said city of Kansas, a certain structure composed of heavy timbers and lumber fastened together; and long prior to said day the defendant had erected, kept, and maintained, and did on said day keep and maintain, in the channel of said river, in a point in said Jackson County and opposite said city of Kansas, nearer the centre of said river than the structure first above-named, a certain other structure, to wit, a crib or box built of heavy timbers filled with stone, which said crib or box extended from the bed of said river upward to a height of thirty feet or more above the surface thereof; that both of said structures were and always have been obstacles in the way of vessels passing by the same up and down said river, and have prevented and rendered the navigation of said river dangerous and unsafe; that said structures were so erected, kept, and maintained by the defendant wrongfully, wilfully, and in flagrant disregard and violation of the rights of plaintiff and others, to the free and unobstructed use of said river as a highway of commerce; that before the erection of said structures the current of said river, at and above and below the point where the same were located and erected, had been in a line nearly parallel to the faces of said structure, and the navigation of the same easy and safe. But plaintiff states that the structure first above mentioned had, on said fourth day of March, 1874, caused the current of the river at that point to change, so that it rushed with great velocity from the point of the location of said structure in a direction nearly at right angles to its former course towards and against said crib or box. And plaintiff states that on said fourth day of March, 1874, it was, in the course of its business, navigating said river with its said steamboat 'Alice,' and while attempting, in the exercise of due care and caution, to run said boat by and between said structures, said boat was, without any fault of this plaintiff, by the current of the river so changed as aforesaid, hurled violently against said crib or box, and the water-wheel, wheel-house, and other parts of said boat broken, injured, and damaged. That plaintiff was compelled to, and did, expend large sums of money in repairing said injuries to said boat, and was, on account of the injuries thereto, wholly deprived of the use of the

same and of the earnings thereof for the period of thirteen days, to plaintiff's damage in the sum of twenty-five hundred dollars, for which, with interest from the first day of April, 1874, plaintiff prays judgment against the defendant." The second count was in substantially the same form, and alleged an injury to the 'St. Luke,' another of plaintiff's vessels, occurring on the fifteenth day of September, 1874, and prayed judgment on account thereof in the sum of \$3,000. To this petition the defendant below first interposed a plea to the jurisdiction of the court, alleging that the structures complained of, and each of them, were at the time of the injuries alleged in plaintiff's petition, and still are, a part of a bridge across the Missouri River at Kansas City, authorized by the Act of Congress approved July 25, 1866, and constructed under and in accordance with the terms and provisions of said Act by the Kansas City & Cameron Railroad Company, of which the defendant company below is the successor; that said bridge was wholly situated at the time of the injuries alleged in plaintiff's petition, and still is wholly situated, within the jurisdiction of the District Court of the United States for the western district of Missouri, and that, by reason of the premises stated, said District Court has exclusive jurisdiction over the subject-matter of this action. This plea having been overruled by the court, and exceptions duly saved, the defendant answered. The answer consisted of (1) a general denial, and (2) a special defence, which latter was pleaded as a full and complete bar to the cause of action alleged in the petition, and is in substance as follows: That at the time of the injury complained of in plaintiff's petition, the defendant was, for a long time prior thereto had been, and still is, a corporation duly organized under the laws of the State of Missouri, and as such corporation, acting as it was authorized to do by the terms of its charter, it had constructed a railroad from the town of Hannibal, in the State of Missouri, to the town of St. Joseph, in said State, and has been ever since maintaining and operating said railroad; that the Kansas City & Cameron Railroad Company, a corporation duly organized under the laws of the State of Missouri, as it was authorized to do by the terms of its charter, had constructed a railroad from the north bank of the Missouri River, opposite said city of Kansas, to Cameron, on the Hannibal & St. Joseph Railroad; that Congress, by an Act approved July 25, 1866, authorized the construction of a bridge across the Missouri River at or near Kansas City, and the Kansas City & Cameron Railroad Company, availing itself of this privilege, between the passage of said Act of Congress, and the fourth day of July, 1869, did construct such bridge at Kansas City; that the Kansas City & Cameron Railroad Company afterwards, to wit, on the fourth day of Febru-

ary 1870, consolidated with the defendant company, whereby the defendant became the owner and proprietor of said bridge; that said bridge was and is a pivot draw-bridge, with a draw over the main channel of said Missouri River at an accessible and navigable point, and with spans of 160 feet in the clear on each side of the pivot-pier of the draw, and the next adjoining spans to the draw were and are 30 feet above low-water mark, and 10 feet above high-water mark, measuring to the bottom chord of said bridge, and the piers of said bridge were, at the times of location and construction thereof, parallel with the current of the said river; that the obstacles and obstructions (the structures) described in plaintiff's petition, and each of them, were at that time, and still are, parts and parcels of said bridge, and were and are necessary to the safe and secure maintenance of said bridge; that said bridge, ever since its completion, has been a post route; and that, by reason of the premises aforesaid, said bridge, ever since its completion, has been and still is a lawful structure; and, if plaintiff has sustained any damage in consequence thereof, it has been without any fault on the part of defendant, and the defendant is not legally liable therefor. Plaintiff in its reply specifically denied every material allegation set up in the special defence of the defendant; and upon this state of the pleadings the case was tried by a jury, resulting in a verdict for plaintiff below on the first count in its petition, for \$2,400, and on the second for \$2,900, in all, \$5,300, upon which judgment was rendered. Plaintiff thereupon excepted, and appealed to the Supreme Court of the State of Missouri, relying mainly upon the question of jurisdiction in the court below, and upon certain alleged improper and illegal instructions given to the jury. The Supreme Court of the State, upon the questions material to a review of the case by this court, held, (1) that the Circuit Court of Jackson County, in which this action was commenced, had concurrent jurisdiction with the District Court of the United States for the western district of Missouri in the case, and that therefore the plea to the jurisdiction was properly overruled by the Circuit Court; (2) that, while the piers of the bridge were constructed parallel with the current of the river, as required by the Act of Congress, in determining whether the spans of the bridge on each side of the pivot-pier were 160 feet in length in the clear, as required by the Act, the measurement should be made at right angles with the current, and not along the structure itself, or on the line of the structure, and, inasmuch as the spans so measured were but 153 feet and a fraction in length, that therefore the structure causing the accident was not a lawful one.

The Act of Congress approved July 25, 1866, giving permis-

sion for the construction of the bridge under consideration, is found in 14 St. at Large, 244, and the sections thereof material to a correct determination of the issue here are quoted in full below. Section 1 provides for the erection of a bridge across the Mississippi River at Quincy, Ill., and for the laying of railroad tracks on and over the same, etc. "And in case of any litigation arising from any obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said construction or bridge touches. Sect. 2. And be it further enacted, that any bridge built under the provisions of this Act may, at the option of the company building the same, be built as a draw-bridge, with a pivot or other form of draw, or with unbroken or continuous spans: provided, that if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than 50 feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge; nor shall the spans of said bridge be less than 250 feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river, not less than 300 feet in length: and provided, also, that if any bridge built under this Act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge, with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than 160 feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than 250 feet; and said spans shall not be less than 30 feet above low-water mark, and not less than 10 above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river: and provided, also, that said draw shall be opened promptly upon reasonable signal for the passage of boats, whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains. Sect. 3. And be it further enacted, that any bridge constructed under this Act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge." "Sect. 10. And be it further enacted, that any

company authorized by the Legislature of Missouri may construct a bridge across the Missouri River, at the city of Kansas, upon the same terms and conditions provided for in this Act."

The material facts in this case, as set forth clearly and distinctly in the frank and able brief of counsel for plaintiff in error, are as follows: "The undisputed evidence showed that the bridge was a pivot draw-bridge; that its piers were parallel with the current of the river, but that they were not at right angles with the current, and ranged diagonally across it; that as a consequence the superstructure of the bridge, erected on the piers, ran diagonally across the current of the river at an angle of 18 degrees; that measuring the spans between the piers, along the line or chord of the bridge, gave a distance of over 160 feet; that the open space between the piers, at low-water mark, measured on the line of the bridge structure, was also over 160 feet, but that a line measured at right angles with the current was only 153 feet and a fraction. It also appeared that the draw-bridge, when swinging open to permit the passage of boats, rested upon two timber structures, called upper and lower draw-rests, which had for their foundation cribs sunk in the river and filled with rock. There was also an ice-breaker in front of the upper draw-rest, and forming a part of it. The draw-rests were connected with the pivot-pier by cribs sunk in the water. These draw-rests, thus connected with the pivot-pier, were situated near the middle of the river, parallel with the current, and all taken together extended up and down the river about the length of the draw, and were necessary parts of the structure. The upper draw-rest, with its ice-breaker attached, was what the petition designated as 'a certain other structure, to wit, a crib or box, built of heavy timbers filled with stone,' and was the structure with which the steamer came in collision. The evidence also tended to show that near the river bank, on the south side of the south draw opening, a row of pontoons was placed, extending from pier No. 1 up the river about 340 feet to the shore; pier No. 1 being about sixty-five feet from the Kansas City shore, and being the pier on which the south end of the draw rested when in position. These pontoons were constructed of a number of flat-boats from fifty-three to sixty-five feet in length, and from eighteen to twenty feet in width, chained together, so that their outer edge presented a straight line next to the channel. On the trial it was not claimed that these pontoons were any part of the bridge. They constituted what the petition called 'a certain structure composed of heavy timbers and lumber fastened together,' near the southern bank of the river. It further appeared that the pontoons remained floating and in position until the latter part of the winter of 1873-74,

when they sank. The evidence for the plaintiff tended to show that they sank transversely, or in a direction quartering out into the river ; that there was a cross-current, starting from near the south shore, above the head of the pontoons, and running diagonally across the river in the direction of the upper draw-rest ; and that while the boats were attempting to pass the draw-bridge, in charge of skilful pilots, exercising ordinary care and skill, they were caught by the cross-current, and hurled against the upper draw-rest, and injured thereby. On the other hand, the testimony for the defendant tended to show that no such cross-current existed, and that the injury to the boats occurred solely by reason of want of due care and skill of the pilots in the management of the boats."

The Supreme Court of the State of Missouri, in affirming the judgment of the Circuit Court of Jackson County, also ruled clearly that the distance of 160 feet between the piers of the bridge required by the Act of Congress should be obtained by measuring along a line between said piers drawn perpendicular to the faces of the piers and the current of the river ; and that, as such line would measure but 153 feet and a fraction, instead of 160 feet, as required, the bridge was not a lawful structure within the meaning of the Act.

The substance of the errors assigned and relied on here relate (1) to the construction given by the State court to the second section of the Act of July 25, 1866 ; and (2) to the ruling of the Supreme Court of the State, approving the giving of plaintiff's instruction No. 1. The plaintiff in error makes no contention here as to the question of jurisdiction urged in its behalf in the State courts, but, on the contrary, expressly states that it agrees with the decision of the Supreme Court of the State upon that question. The sole question, therefore, for our decision relates to the construction given by the State court to that part of the Act of Congress defining the manner in which the bridge should be built ; i.e., that the distance of 160 feet between the piers of the bridge, required by said Act, should be obtained by measuring along a line between said piers, drawn perpendicularly to the faces of the piers and the current of the river ; and that, as such line would measure but 153 feet and a fraction, instead of 160 feet, as required, the bridge was not a lawful structure. It is strenuously urged by the counsel for plaintiff in error that the bridge we are considering meets the express requirements of the statute ; that the word "spans," as used in the statute, means the structures or parts of the bridge which span the river on each side of the pivot-pier, and it is these spans which the statute says shall measure 160 feet in length in the clear on each side of the central or pivot-

Assignments of
error. Question for decision.

pier of the draw ; and that the bridge, having been constructed according to the requirements of the statute, in its own words, is therefore a legal structure ; that the Supreme Court of Missouri, in declaring that "we must look to the spirit and reason of the Act, the purpose of which manifestly was to reserve for the purposes of navigation 160 feet of open space in the clear, wholly unobstructed, and available for the passage of vessels," ignored the plain language of the provision, and inferred an intention contrary to that language ; that there was nothing whatever in the statute to show any intention on the part of Congress to reserve "160 feet of open space in the clear, wholly unobstructed ;" and that the Act nowhere defines the precise direction of the bridge, but intrusted that direction to the discretion of the company. We do not consider this sound reasoning. The statement that there is nothing whatever in the statute to show any intention on the part of Congress to reserve "160 feet of open space in the clear, wholly unobstructed" is repelled by every provision in the Act specifying the dimensions of the various parts of the structure. The fact that Congress prescribed in said Act such minute details concerning the manner in which the proposed bridge should be built, — the requirement that it should be constructed with a draw over the main channel of the river at an accessible and navigable point ; the provision that the piers of said bridge should be parallel with the current of the river ; that prescribing the height of the spans above the surface of the water, — and the very rigid directions as to the opening of the draw upon reasonable signals, without delay, for the passage of boats, show how careful Congress was in preserving these navigable rivers as highways of commerce, and in guarding the interests of the public, and especially of those engaged in navigating the rivers that would be spanned by the structures authorized by said Act. We concur with the court below that we must look to the spirit and reason of this provision of the law, and construe it with reference to its evident purpose to connect with the exercise of the privileges therein granted such limitations as will guarantee protection to the navigating interests affected by the proposed legislation. Can it be said that the object and purpose of the law was simply that a bridge should be built across the Missouri River at Kansas City for the benefit of the railroad company alone ? Manifestly not ; for in that case it would have been only necessary to grant the privilege of building a bridge at the place designated, without any limitation or condition as to its mode of construction, except such as the discretion of the company might determine. In what we have said we do not wish to be understood as assenting to the

Reserving un-
obstructed
space. Inten-
tion of Con-
gress.

proposition that the strict letter of the statute supports the contention of the plaintiff in error. The word "span" does not, even in architecture, always mean a part of a structure. It is, perhaps, as often used to denote the distance or space between

Meaning of
"span."

Measurement
of distance
between spans.

two columns. Such is the obvious import of the term as used in the Act under consideration; not merely as a part of the structure itself, but the measure of the distance between the piers of the bridge, —the measure of the space left open for navigation purposes. A similar provision to this may be found in an Act of the Illinois Legislature authorizing the construction of a bridge across a river; and the word "space" is used, where in this Act we have the word "span." It is said that the Act nowhere defines the precise direction of the bridge, but leaves that to the discretion of the company. The answer to this is, that by the express terms of the Act of Congress the piers of the bridge across the river are required to be placed parallel with the current. To the word "across," unless it is qualified by some prefix, as "diagonally" or "obliquely," there is attached, in ordinary use, but one meaning, and that is a direction opposite to length. This is especially true when it is used in connection with parallel lines. When the piers are placed parallel with the current of the river, they are parallel with one another, and the faces of the piers may properly be considered as so many parallel planes. The spans of the bridge are to be not less than 160 feet in length in the clear on each side of the pivot-pier of the draw; that is, from the face of the central pier to the face of the next adjacent pier must be a distance of not less than 160 feet in the clear. Now, it is an elementary principle of mathematics that "the distance between two parallel planes is measured on a perpendicular to both." But if there be any doubt as to the proper construction of this statute (and we think there is none), then that construction must be adopted which is most advantageous to the interests of the government. The statute, being a grant of the privilege, must be construed most strongly in favor of the grantor. *Gildart v. Gladstone*, 11 East, 675; *Bridge v. Bridge*, 11 Pet. 544; *Railroad Co. v. Litchfield*, 23 How. 66; *The Binghampton Bridge*, 3 Wall. 75; *Rice v. Railroad Co.*, 1 Black, 380; *Railroad Co. v. U. S.*, 92 U. S. 733; *Fertilizing Co. v. Hyde Park*, 97 U. S. 660. As persuasive authority in support of the conclusion we have reached with reference to this bridge, may be cited the case of *Insurance Co. v. Bridge Co.*, 6 McLean, 70; also the case of *Packet Co. v. Railroad Co.*, 1 McCrary, 281, the latter being a decision of the Circuit Court of the United States for the western district of Missouri in a case between identical parties to this suit, and concerning this identical bridge. In this last case

Judge McCrary says, "If it be granted that a measurement along a line which deviates from a course directly across the channel is the proper one, then it would follow that the actual passage-way might be less than that required by the Act. The greater the deviation from such a direct line, the less would be the available space between the piers. Such a construction of the Act would defeat the main purpose which Congress had in view in its enactment." We are therefore of the opinion that the Supreme Court of the State of Missouri committed no error in its construction of the Act of Congress under consideration.

A reversal of the judgment brought here for review is also asked upon the ground that the Supreme Court of Missouri erred in sustaining the Circuit Court of Jackson County in giving to the jury what is called "plaintiff's instruction No. 1." This instruction is as follows: "The jury are instructed that unless the bridge mentioned in the answer had piers which were parallel with the current of the river, and spans of not less than 160 feet in the clear on each side of the pivot-pier, then said bridge is an illegal structure, and an unlawful obstruction to the navigation of the Missouri River; and if the jury believe from the evidence that it was not such a bridge, and further believe that the plaintiff's boats, 'Alice' and 'St. Luke,' or either of them, while attempting to pass through the draw of the bridge in charge of pilots exercising usual and ordinary care, struck the draw-rest of the bridge, and were thereby damaged, then the jury will find their verdict for the plaintiff as to such boat or boats." It is said that by sustaining this instruction the Supreme Court of Missouri held that the mere fact that the bridge had not been constructed as required by the statute rendered the railroad company liable, irrespective of the question whether the improper construction caused the accident; and it is urged that such holding is erroneous. This, however, does not present any federal question for the consideration of this court, and therefore we decline to examine into its merits. *Murdock v. City of Memphis*, 20 Wall. 590; *Allen v. McVeigh*, 107 U. S. 433; 2 Sup. Ct. Rep. 558. Upon the only questions of this case cognizable by this court, the judgment of the Supreme Court of the State of Missouri is affirmed.

Instruction as
to liability for
injury to boats.

For opinion of Supreme Court of Missouri which is affirmed by the above case, see *Missouri Packet Co. v. Hannibal, etc., R. Co.*, 20 Am. & Eng. R. R. Cas. 275, note, 285.

STATE *ex rel.* CITY OF MINNEAPOLIS

v.

ST. PAUL, MINNEAPOLIS, & MANITOBA R. CO.

(Minnesota Supreme Court, March 5, 1888.)

Construction of Railroads — Bridge over Crossing — Mandamus. — Where, in *mandamus* proceedings to compel a railway company to restore a street crossing to a suitable condition for the public convenience and safety, the court found that the plan proposed by the relator was suitable, appropriate, and adequate for such purpose, and the return to the Supreme Court on appeal fails to disclose the evidence upon which such finding is based, it will be presumed that the evidence on which the court acted was sufficient to justify its determination.

Same — Public Convenience. — Where the plan includes a bridge over the contiguous tracks of two railway companies, it must necessarily have reference to the rights of each in accomplishing the general purpose of the public accommodation and convenience; and neither can be compelled to surrender its property, or change its route further than is reasonably necessary for such purpose.

APPEAL from District Court, Hennepin County.

Mandamus. The opinion states the case.

Benton & Roberts, W. E. Smith, and M. D. Grover for appellant.

Seagrave Smith, City Attorney, and *Fudson N. Cross*, for respondent.

VANDEBURGH, J.— This is a proceeding by *mandamus* to require the appellant company to bridge certain streets in the city of Minneapolis. The appellant answered to the writ. A trial was had, and judgment was ordered in favor of the relator, substantially in conformity with the plan produced on the trial by the relator, and the company appeals. The record shows that a similar proceeding was instituted against the Minneapolis & St. Louis Company, whose tracks cross the same streets, and adjoin those of the appellant on the south. The purpose of these proceedings is to compel each of these companies to build its share of the required bridges across the railway tracks in question, with the proper approaches, abutments, etc., to the end that the streets may be restored to a suitable condition for travel and the safety of the public, as required by the charters of the companies. The foundation of the proceeding is the omission of its duty by the railroad company to

restore a street crossed by its railway to a safe condition for crossing, so as not to interfere with its free and proper use. The relator alleges such omission, and points out the changes and measures which it claims to be requisite to restore the street. It is the duty of the court to determine these questions ; and, if the claims of the relator are established, the peremptory writ is to issue for the restoration of the street in conformity with the requirements of the alternative writ, or with such reasonable modifications as may be found expedient by the court, not affecting the substance of the relief. *People v. Railroad Co.*, 58 N. Y. 163. The two cases, it appears, were tried and heard together in the court below, though not formally consolidated, and thereupon the separate judgment formulated in each case, based upon the record before the court, related to and was in conformity with one general plan for bridging the space covered by the tracks of both companies, upon a hearing of all parties interested.

The appellant objected to the plan proposed by the city, and in lieu thereof proposed another which it is willing to accept, the details of which are set forth in the answer, and in its proposition map and plans introduced on the trial, and which it insists is the most eligible, both for the city and the railway companies interested. This plan involved a change in the location of the main track of the St. Louis Company, which crosses Washington Avenue, one of the streets in question (and which the latter company is required to bridge, under the plan of the relator), and the removal thereof to a line designated by the appellant "to the northerly side of its land or right of way," contiguous to its own tracks, which are all to be there located beyond its proposed freight depots, which it is proposed to place on the southerly side of all the tracks of both companies. The tracks of both companies were thus to be located as near together as practicable, and the grade lowered so as to admit of a shorter bridge with easy approaches. And it is represented by the appellant, that, to carry out this proposition, it had purchased land adjoining its right of way, and incurred large expense for the purpose of making such change of grade and location. It also alleges that the track in question was laid in pursuance of a contract between the companies, under which the appellant leased to the St. Louis Company, its successors and assigns, forever, the right to build, maintain, and operate a single-track railroad upon the land of the appellant between certain designated points, and including the track in dispute. This contract also contains certain stipulations, set forth in the answer, touching the building, operation, and control of such track, and the mutual rights and obligations of the companies in respect thereto. These allegations the court finds to be true, "except that in an action between the

two companies, involving the right of the appellant to remove and change the location of the track in controversy, it was on the ninth day of March, 1886, adjudged that the St. Louis Company is entitled to maintain and operate forever upon the land now occupied by its track [mentioned in paragraph 4 of the answer] a single-track railroad, and respondent [appellant here] was enjoined from removing or obstructing the same." The court further finds that in its judgment "the plan proposed by the appellant here, and more fully disclosed by the offer and map filed at the hearing [and which the relator was willing to accept], would, if accepted and conformed to by the Minneapolis & St. Louis Company, be better than any other for both companies and for the public; but that the St. Louis Company is unwilling to consent to the removal of its track, so as to make this plan feasible." But the court also finds in favor of the relator, in respect to the plan proposed by it, that the allegations contained in the ninth paragraph of the writ are true; to wit, "That the bridges," approaches, plans, and specifications for the same, as shown upon Exhibits A, B, C, and D, "are necessary, reasonable, and practicable; and the same have been devised by the city engineer, and approved and adopted by the city council, and required by said city council to be constructed by said railway company." None of the evidence produced by the relator, and neither of the exhibits referred to in the last finding, are returned to this court; nor does the return show any of the evidence on the part of the appellant except the written offer above mentioned, and the evidence in the former suit between the companies, which culminated in the decision of this court in the case before referred to. It must be assumed, therefore, that the evidence was such as to justify the court in adopting the plan proposed by the city, and that the same was adequate and suitable for the purposes of securing a crossing in conformity with the charter of the company. And this also necessarily disposes of the appellant's third, fourth, and sixth assignments of error, in respect to the number and character of the bridges, and the nature of the approaches ordered.

But the assignment of error chiefly relied on in argument is the first; that is to say, that the court erred in refusing to adopt the plan for a crossing which it found to be the best, — viz., that of the appellant, — and particularly in determining that it had no power to require the adoption of that plan. This is based on the seventh paragraph of the court's findings in this case, above quoted, wherein the failure of that plan is attributed to the refusal of the St. Louis Company to consent thereto; and the statement of the court in its memorandum of the reasons for its decision, filed

**Failure of
court to adopt
appellant's
plan for
crossing.**

in the St. Louis case, but referred to and adopted by it in this case, from which it appears that the court was of the opinion that it had no power to compel the St. Louis Company to accept the plan offered by the appellant. This is the only finding on the subject in this case. There is nothing in the case going to show that the court placed its decision on the ground that it had no power to require any change in the alignment of the track of the St. Louis Company, or that it might not require such reasonable change therein as might be found necessary to secure a suitable crossing (for the fair inference is to the contrary); but, having found that the plan of the city answers the end and purpose of the proceeding, it determined that it had no power to compel the St. Louis Company to make the specific change demanded by the appellant. This sufficiently appears from the record; and the error complained of is, not that the court held it had no power to make any change *at all*, but that it had no power to compel the adoption of the appellant's plan. The trial court was in a better position to determine, upon an examination and comparison of all the evidence in the case, the nature, extent, and effect of the proposed change, and its determination must have been made upon full argument of counsel for both companies. For example, the evidence not being before us, the record here does not show whether the new proposed line for the St. Louis Company is located upon the old right of way of the appellant, or upon the lands lately purchased by it; nor does it show the distance between the old and new line, except that at Washington Avenue it is apparent that it must be more than 120 feet, which is indicated as the space occupied by the proposed freight depots and the intervening roadway. However desirable such a change might be as a matter of convenience and expediency, — and we have no reason to question the opinion of the court on this point, — we are unable to say upon this record (where it is found that the plan which the city proposes is suitable and sufficient) that the court was wrong in holding that it would be an unauthorized and arbitrary act on its part to require the St. Louis Company to abandon the plan of a bridge over its own original tracks, and accept the plan of the appellant, requiring a new route to reach the bridge of the latter. How far the court may in such cases, by its order or judgment, compel changes in the alignment or grades of a railway, it is not necessary to determine in this case; but we think it is evident that it would not be justified in interfering by *mandamus*, against the consent of the company, further than is reasonably or necessarily incident to the accomplishment of the main purpose of the proceeding. Where, as in this case, the railways of different companies are contiguous, and each company is required to build a distinct portion

of what must constitute substantially one continuous structure, the plan adopted must necessarily have reference to the situation and rights of all in the accomplishment of the general purpose of the public accommodation ; and neither can be compelled to surrender its property or change its route further than is reasonably necessary for such purpose. The plan proposed by the appellant appears to be one framed chiefly for its own accommodation and the convenient transaction of its business, — a bridge for its own tracks, with provisions for the track of the other company and connections ; and, had its interests required a different plan, still other and further changes in the line of the St. Louis Company might have been necessary. And so, under other circumstances, it might be met by a counter-plan of the other company, requiring as radical changes on its part ; and, if the court could arbitrarily interfere in one case, it could in another. Nor do we see that any different rule could be applied if the defendants were united in one equitable suit. And, while each corporation will be compelled to perform its duty in the restoration of the crossing, yet, in attempting to adjust the rights of the parties between themselves in such an action, there would be the same limitations upon the power of the court, in respect to their separate legal rights to real property. The court would have to be governed by the same rule in enjoining a suitable crossing, and the modifications in grades or lines must be such as necessarily result from the application thereof. The relator brought the two cases to trial in the court below at the same time, and the trials proceeded *pari passu*, and a full hearing of the whole case has been had without objection. In this court, the relator, representing the public, is satisfied with the judgment, and insists that the question raised, and chiefly argued by the appellant, is one entirely between the two companies, and in no way affects the right of the city to insist upon the plan proposed by it, and therefore declines to argue that question here.

It is also urged by the appellant that the tenure of the St. Louis Company to the land upon which its track is situated is such that it has no right to change the grade of its tracks without the consent of the appellant. This is a question to be raised in the proceeding against that company ; but it does not in any event go to the merits, since the court can, by operating directly upon both companies alleged to be interested in the land, compel obedience to its mandate in a proceeding against both, if it be necessary. And since, as held by the trial court, the duty of the St. Louis Company to restore the crossing is an absolute one, it will be for that company to secure such additional land

Right of
St. Louis Co.
to change
grade.

or rights, or make such changes, as may be necessary to effect that result, or abandon the crossing. So far as the record discloses, no objection was raised in the court below to the form of the proceeding, or because of the absence of necessary parties; and we know of no reason why the case has not been fully and fairly investigated, and a just and legal determination of the rights of the parties reached. And while, doubtless, the public convenience and that of the companies would be promoted by an amicable arrangement or compromise between them, we are unable to say that the court mistook the law, or erred in its application to this case. Order affirmed, and case remanded for further proceedings.

MITCHELL, J. (*dissenting*). It seems to me, that, if language means any thing, there is no evading the fact that the decision of the court below is based expressly and exclusively upon the proposition that it had no power to adopt any plan of bridging these streets which would involve the necessity of the Minneapolis & St. Louis Railroad Company changing the alignment of its tracks, unless it consented to do so, and that, if the court had believed that it had such power, it would, to use its own language, not have hesitated to exercise it as for the best interests of all concerned, and adopted the plan suggested by the appellant. In this, I think, the court erred. It may be true that the court might not have had the right to directly command that company to locate its track at any particular locality: but inasmuch as the duty of the company to restore the street to a condition suitable for use of the public is an absolute one, the court had a right to compel this to be done in such manner as would best subserve the interests of all parties; and if this involved the necessity of the Minneapolis & St. Louis Company moving its tracks, or securing more ground to enable it to perform its duty to the public, that is its own concern. It must perform its duty to the public, or abandon the crossing. I think the judgment should be reversed.

CHICAGO, BURLINGTON, & QUINCY R. Co.

v.

SCHAFFER.

(*Illinois Supreme Court, March 28, 1888.*)

Railroad Bridge — Defective Construction — Damages — Res Adjudicata. — In an action against a railroad company to recover damages to plaintiff's land by the overflowing of a stream caused by the improper and negligent construction and maintenance of a railroad bridge, a judgment in a former suit is no bar to a recovery for injuries sustained subsequently to the rendition thereof.

Same — Parol Evidence to explain Judgment. — In such suit, where the judgment offered in evidence as a bar does not show the full and true state of the matters litigated, parol evidence may be given to show the extent of the recovery thereunder.

APPEAL from Appellate Court, third district.

Action to recover damages for obstructing the natural flow of a water-course. The opinion states the case.

J. F. Carroll for appellant.

Carter & Gouert for appellee.

MAGRUDER, J. — This is an action of case, begun on Sept. 22, 1885, by the appellee against the appellant company, in the Circuit Court of Adams County, to recover damages for

Facts. obstructing the natural flow of water in a certain water-course called "Harkness Branch," by maintaining a certain railroad bridge over said branch so as thereby to throw the water upon plaintiff's land, and injure the same, and the growing crops thereon. Pleas of the general issue, statute of limitations, and leave and license, were filed to the declaration. There was no special plea setting up the judgment hereinafter named as a bar. The trial resulted in verdict for \$500 in favor for plaintiff, and judgment thereon; which judgment has been affirmed by the appellate court. On Oct. 8, 1883, William Schaffer, the present appellee, brought against the Chicago, Burlington, & Quincy Railroad Company, the present appellant, a suit for damages resulting from the overflow of water in this same branch, alleged to have been caused by constructing and maintaining this same bridge; which suit resulted in a verdict for \$600 in favor of Schaffer, and a judgment upon said verdict rendered on May 5, 1884. The amount of this former judgment was paid to

appellee by the railroad company on July 17, 1885. Upon the trial of the present suit the railroad company introduced in evidence the record of the former suit, including the *præcipe*, summons, pleadings, verdict, judgment, and Schaffer's receipt for the amount of the judgment, and claimed that the verdict and judgment in such former suit constituted a bar to any recovery in this suit. The certificate of the judges of the Appellate Court, by reason of which the case is brought before us, certifies that in their opinion "this case involves a question of law of such importance, on account of principal interests, as that it should be passed upon by the Supreme Court; that is, whether the former judgment between the parties is a bar to the present action, it appearing from the evidence that the structure complained of was imperfectly built, and that there was negligence in the mode of the construction of said bridge."

While this court cannot be confined to the consideration of a particular question that is specified in the certificate of importance, but, after the granting of such certificate, may consider any question of law properly arising upon the record, yet the only question which we deem it necessary to discuss in the case at bar is whether or not the judgment in the former suit between these same parties is conclusive of the issue in the present suit; it being admitted by the counsel for appellant, in their brief, that this is "the main question, and the real bone of contention, between the parties in this case."

Question for
decision.

That this bridge was improperly constructed, so as to obstruct the free passage of the water in Harkness Branch, is a question of fact, which is settled by the judgment of the Appellate Court. The bridge was built upon piles, and was not a truss bridge, such as might have been built so as to leave the stream unobstructed. The piles were set at an angle to the current of the stream, and not in line with the current. The caps upon the piling were set obliquely to the line of the stream. The piles were from one foot to fourteen inches in diameter, and about five feet apart. The timbers of the bridge, the caps, rails, ties, and stringers, were so arranged as to largely reduce the space for the water to pass under the bridge. The results of all these defects were, that brush, logs, and other drift could not pass through without obstruction, and were caught and held; that the channel of the branch filled up with gravel, sand, and sediment under the bridge, and for some distance east and west of it, thereby lessening the depth of the channel; and that in times of freshets the water should be deflected from its natural course, and would overflow upon the land of plaintiff and other adjoining

Defective construction of
bridge.

owners. Appellant claims that the injury resulting from the construction of the bridge was a permanent one, and depreciated the value of appellee's land, and consequently that all damages for past and future injury to the property either were or might have been sued for and recovered in the former suit, and that such former recovery is a bar to any further prosecution for the injury resulting from the erection and continuance of the nuisance. In other words, appellant invokes the aid of the doctrine laid down by this court in *Railroad Co. v. Loeb*, 118 Ill. 203; s. c., 27 Am. & Eng. R. R. Cas. 415, and in other cases therein referred to. But the "doctrine as to entireness of recovery in one action, where the cause of injury is of a permanent kind," is "limited to the case of a railroad built under authority of law, and in a reasonably proper and skilful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from the building and operating the road." *Railway Co. v. Wachter* (opinion filed at Mt. Vernon in January, 1888). In the case at bar the bridge was not built "in a reasonably proper and skilful manner," and the loss and injury have resulted from its improper construction. We said in the *Wachter* case, "This court has never held, nor is it prepared to hold, that a railroad company is not liable for damages resulting from its negligence, either in the construction, maintenance, or operation of its road. . . . Public health and convenience, as well as the positive law of the State, alike demand that railways leading over natural streams and drains should, by means of efficient and substantial culverts or otherwise, be so constructed as to admit the escape of accumulating waters through them in times of high water as well as low." In the case at bar the proof tends to show, that, before the erection of the bridge complained of, the water in Harkness Branch did overflow its natural banks, even in time of high water, at the point where it passed appellee's land. Appellant's right of way crossed the branch. The construction of a bridge over the branch was necessary to the operation of appellant's road. If the bridge had been properly built, whatever injury it may have caused to appellee's land would have been the necessary result of the existence of a necessary public improvement, and would have been permanent in its character. The effect of the construction of the bridge upon the value of the land could be estimated at once, and it would answer all just purposes to allow but one action for the recovery of all damages. But where the bridge has been imperfectly built, and there has been negligence in the mode of its construction, the party whose property is damaged is not bound to assume that the structure will be a permanent one. To indulge in such assumption would be to take it for granted that the

railroad company, having done a wrong, intended to continue in such wrong-doing. Undoubtedly, if the injured party treats the defective structure as a permanent source of injury, and recovers the full amount of damages, both present and prospective, which his property sustains, or may sustain, by reason of such defective structure, he will be estopped from bringing a second action for damages. But where the railroad company has, as in this case, built an imperfect and faulty bridge over a stream of water crossing its right of way, a party suffering damage therefrom has a right to regard the nuisance as of a transient character, and, instead of bringing one action for the whole injury to the value of his property resulting from the original construction of the nuisance, he may sue for the amount of such injury as he suffers from its continuance. *McConnel v. Kibbe*, 29 Ill. 483.

The question, then, arises, whether or not the record of a former recovery, introduced in evidence by appellant, showed a recovery for all the damages, present and prospective, which appellee's property had suffered, or might suffer, from the erection and maintenance of the bridge. The pleadings in the former suit do not present precisely the same issue as is presented by the pleadings in the present suit. The second count of the declaration in the latter suit alleges that the defendant "did, to wit, on May 1, 1884," etc., "wrongfully maintain and continue a certain obstruction," etc., "being duly requested to remove said wrongfully constructed obstruction to the free running and flowing of the water in said stream." This count claims damages for the continuance of the nuisance. There was no such count in the declaration in the former suit. An action may be maintained for the creation of the nuisance, and a subsequent action may be maintained for its continuance. The continuance of that which was originally a nuisance is regarded as a new nuisance; and, although a recovery may be barred upon the original cause, an action on the case may be brought, at any time before an entry is barred, to recover such damages as have accrued, by reason of its continuance, within the statutory period. *McConnel v. Kibbe*, 29 Ill. 483.

Same. What is shown by record of former recovery.

An examination of the declarations in the former and in the present suit leaves it doubtful whether the subject-matter involved in the latter was actually passed upon in the former, and hence it was proper to receive parol evidence to show the truth. Where a former recovery is relied on as a bar, parol evidence, not contradictory of the record, may, in case of such doubt, be introduced to show what was included within and investigated on the trial of the issue. If the face of the record does not show the full and true state of the controversy and the matters investigated, parol evidence must be admitted to supply what is not shown.

Vanlandingham v. Ryan, 17 Ill. 25 ; Barger v. Hobbs, 67 Ill. 592. 1 Greenl. Ev. (14th ed.) sect. 532, says, "When a former judgment is shown by way of bar, whether by pleading or in evidence, it is competent for the plaintiff to reply that it did not relate to the same property or transaction in controversy in the action to which it is set up in bar; and the question of identity thus raised is to be determined by the jury upon the evidence adduced." The evidence introduced upon the trial of this case tends strongly to show, and, indeed, seems to be undisputed by the appellant, that the damages recovered in the former suit were such as resulted from an overflow of water occurring before the beginning of such suit, and from injuries to crops then growing upon appellee's land, and from injuries to about five acres of said land caused by the deposit thereon of drift, gravel, dirt, sand, and stone; while the injuries which form the basis of the present recovery have been caused by overflows occurring since the institution of the former suit, resulting in the deposit of sand, stone, gravel, etc., upon nine acres of land, which do not include the five acres above mentioned, and resulting in the destruction of crops planted since the former suit was begun. It follows, that, by the recovery of the present judgment, appellant is not required to pay the same damages twice.

The views herein expressed dispose of the various objections made by counsel for appellant to the instructions and to the introduction of evidence.

Some proof was introduced upon the trial below which tends to show that 14 acres of appellee's land were damaged by the floods of 1884 and 1885, and that such 14 acres included the 5 acres for the damage to which a recovery was had in the first suit. But the jury were sufficiently warned by the instructions, given for both appellant and appellee, against allowing any damages for injuries which formed the subject-matter of the former recovery. The first instruction given for the plaintiff, after directing the jury as to the assessment of damages, closes with the words, "not including, however, any damages recovered in the first suit, the judgment in which is in evidence before the jury." The second instruction given for plaintiff closes with the words, "not including any damages recovered or claimed in the former suit mentioned in the evidence." The fifth instruction given for the plaintiff contains the following sentence: "And the jury are instructed not to allow said plaintiff any thing for or on account of damages done to his close, premises, or crops on or prior to the eighth day of October, A.D. 1883." The eighteenth instruction given for defendant told the jury "that the record of the former action . . . is conclusive against the plaintiff in this action as to

Instructions as
to allowing
damages.

all matters which were put in issue or offered in evidence on the first trial ;” and the nineteenth instruction given for defendant stated that such record was conclusive as to all matters which were put in issue on the trial of the former case, “no matter whether said Schaffer recovered all he claimed in such suit or not.” The twentieth instruction given for defendant, which was prepared and asked for by defendant’s counsel, is as follows: “The court further instructs the jury, as a matter of law, that for damages accruing after a judgment in a former action between the same parties, and arising out of the same cause, or resulting from one and the same injury, an action will not lie.

We perceive no such error in the record as would justify us in a reversal of the judgment. The judgment of the Appellate Court is accordingly affirmed.

In Action for continuing Nuisance, Judgment in former Suit is not a Bar. — See *Omaha & R. V. R. Co. v. Standen*, next case.

OMAHA & REPUBLICAN VALLEY R. CO.

v.

STANDEN.

(*Nebraska Supreme Court.*)

Eminent Domain — Property injuriously affected. — By the insertion of the words “or damaged” in the Nebraska Constitution of 1875, art. 1, sect. 21, a right to recover damages for injuries to property was conferred, although no property belonging to the party injured has been taken.

Railroad Bridge — Effect of Construction — Overflow of Land. — Where a railroad bridge is so negligently constructed across a river as to form an unlawful obstruction, and become a nuisance by causing an overflow of the river, no right of action accrues to the land-owner until he sustains an actual injury caused by such unlawful obstruction as by an overflow of his land.¹

Same — Continuing Nuisance — Estoppel. — The erection and maintenance of a bridge in such a position that it forms an obstruction to the flow of waters, and causes a periodical overflow of the adjacent lands, is a continuing nuisance, in consequence of which a recovery is limited to damages which may have accrued before an action is brought, and a judgment in one action is not a bar to a second action brought for damages sustained thereafter.

ERROR to District Court, Saunders County.

Action to recover damages for injuries sustained by plaintiff through an overflow of his lands. The facts are stated in the

¹ OBSTRUCTION TO STREAM BY BRIDGE, thereby causing the flooding of adjacent property. See *post*, *Gulf, C. & S. F. R. Co. v. Pool*.

opinion. Judgment for plaintiff, to review which the defendant brings error.

Error from Saunders County; Marshall and Post, Judges.

W. R. Kelly for plaintiff.

E. F. Gray and *W. H. Munger* for defendant.

MAXWELL, C. J. — The defendant in error brought an action against the plaintiff to recover damages for the negligent and wrongful construction of its bridge across the Platte

Facts.

River, whereby it is alleged that in March, 1886, a gorge was formed above the bridge, which threw the water of the Platte River out of its channel over the lands of the defendant in error, and thereby caused him a large amount of damage. The railroad company demurred to the petition upon the grounds that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled, and, the company declining to answer, a judgment was rendered against it for the sum of \$1,000. It now prosecutes a petition in error in this court; the question being, "Does the petition state facts sufficient to constitute a cause of action?"

It is alleged in the petition, that "the said defendant now is, and ever since the year 1875 has been, a corporation duly incorporated and organized under and pursuant to the laws of the State of Nebraska; and ever since the year 1877 has been the owner of and engaged in running and operating a railroad leading from Valley Station, in Douglas County, to Lincoln, through the counties of Douglas, Saunders, and Lancaster in the State of Nebraska; that the plaintiff now is, and ever since the year 1882 has been, the owner in fee and in the actual possession of the lands described, as the south-west quarter of section six, in township fifteen north, of range ten east, and the north-east quarter of the south-east quarter and north half of the south-east quarter of the south-east quarter, and lot seven, and the north twenty-six and 40-100 acres of lot nine, of section one, of township fifteen north, of range nine east, comprising two hundred and fifty-nine acres in all, and all lying and being on the bottom land of the Platte River, and bordering on said river on the north bank thereof, in Douglas County, Nebraska. That ever since the year 1882, down to the committing of the wrongs and injuries hereinafter complained of, the plaintiff resided on said lands with his family, and erected and maintained a dwelling-house, barn, stables, storehouses, *corrals*, feed-yards, field and pasture fencing thereon, and cultivated a large portion of said land as a farm, and on a portion forest trees grew naturally, and on a portion plaintiff maintained a meadow for hay and pasture for cattle, horses, and hogs, and carried on the business of

raising, feeding, and fattening cattle and hogs, and kept many horses and large quantities of hay and grain on said lands; that plaintiff's immediate grantor of said lands, one Everett G. Ballou, had, for not less than ten years immediately preceding his sale and conveyance to plaintiff of the same, owned and been in actual possession of and resided on said land, and cultivated, used, and maintained the business thereon, the same as the plaintiff after his ownership and occupation thereof, as aforesaid; that the plaintiff's said lands, ever since the year 1872, and as in its natural state and condition, were and have been lower than the banks of said Platte River, and as well as all the lands roundabout the plaintiff's said land, for many miles, were and have been ever since the year 1872, and as in its natural state, lower than the banks of said river; and plaintiff's said lands, as well as the said lands roundabout, ever since the year 1872, and as in its natural state, were and have been liable to be overflowed by any obstruction of the natural flow of said river; that the defendants, well knowing all of the foregoing facts, and of the said conditions of said lands, and of the occupation, improvements, and business thereon, maintained as aforesaid and against and contrary to notice and warning, did, negligently, unlawfully, and wrongfully, in the month of November, 1876, commence, and by the month of July, 1877, complete and construct and erect, a railroad bridge on its said line of railroad, between the counties of Douglas and Saunders in Nebraska, over and across the said Platte River, for its exclusive use, at a point about one-quarter of a mile above the plaintiff's said lands, in a westerly direction therefrom, the said bridge being so erected and constructed as to create an unlawful obstruction in said river, and to prevent the natural flow of ice and water therein, and to cause the natural flow of ice and water in the spring of the year to gorge, back up, and overflow the banks of said river, and thereby greatly injure and damage adjoining lands and property, and especially the said lands of the plaintiff as aforesaid, and the property thereon and the business thereon maintained as aforesaid; that by reason of the said bridge and as well the approaches thereto, being so negligently, wrongfully, unlawfully, and improperly constructed and erected by said defendant as aforesaid, the said bridge and its approaches, on or about the twenty-seventh day of February, 1886, did so obstruct the natural flow of ice and water in said Platte River as to threaten an ice-gorge and blockade at such point, and thereby cause the ice and water in said river to break over the north bank thereof, and to flow over the adjoining lands, and especially of the plaintiff's said lands to the immediate injury thereof, and to the injury and destruction of the plaintiff's said property and business thereon, all of which facts defendant well

knew at the time of such threatened and impending overflow and damage ; that, notwithstanding such knowledge, and although notified of the then condition of said river, and of the obstruction and threatened overflow as aforesaid, and warned then of the probable consequences of permitting such obstruction to remain, and it then being practicable for the defendant to have removed said obstruction, and thereby to have prevented the gorge and overflow and damage to plaintiff that followed, with little expense, within not exceeding one day's time, and before any considerable overflow was caused, or any considerable damage was done, with but slight injury to said bridge, yet the defendant neglected and refused to remove said obstruction, or to make a sufficient opening in said bridge to allow the ice and water of said river to flow in the natural channel thereof ; that as the direct, natural, and probable result of permitting said bridge and approaches to remain as an obstruction in said river as aforesaid, a large ice-gorge, at said last-mentioned date, commenced to form at said bridge and approaches, and so did form and continue for twenty-four days, of sufficient height and strength to completely turn the entire flow of ice and water running in said river, against, over, and through the said north bank of said river, at and above said bridge, and above the plaintiff's said lands, and to cause the said ice and water of said river to rush and flow with great force, depth, and violence over the plaintiff's said land, and over the surrounding lands, for many miles in extent, and so continue for twenty-four days, and until the pressure of ice and water against said bridge broke through and carried away a portion of the same, when said ice and water immediately receded and flowed down the natural channel of said river ; that by reason of said ice and water being forced over and through said north bank as aforesaid, and the ice and water with great force, depth, and violence rushing and flowing over the plaintiff's said lands as aforesaid, and over the surrounding lands as aforesaid, the plaintiff's said lands, and the lands surrounding the same for many miles in extent, were inundated and overflowed for the space of twenty-four days, and thereby and in consequence of said ice-gorge and obstruction and wrongful and unlawful and improper erection and construction of said bridge and approaches, the plaintiff was greatly injured and damaged in this, to wit, his said cultivated farm land of 125 acres was stripped of its soil over its entire extent, and the same was gullied out in places, and ridges of sand formed in places thereon, and large deposits of sand spread over the whole of it, so as that the said 125 acres, which was good farming land at the time of said overflow, was by said overflow greatly injured and rendered unproductive to the plaintiff's damage in this behalf in the sum of \$625 ; his said meadow and

pasture land of 134 acres was stripped of its soil over its entire extent, its grass killed out, its surface gullied out and ridged, and the whole covered with a deep deposit of sand, and the natural forest trees, growing on a portion of said pasture land, were broken down, rooted up, and destroyed, to the plaintiff's damage in this behalf of \$767.50; his fencing on said land to the extent of 480 rods of fencing was broken down and washed away and destroyed to his damage in this behalf \$720; his corn in field on his said lands to the amount of 1,000 bushels was washed away and destroyed to his damage in this behalf of \$200; his hogs to the number of 20, his cattle to the number of 18, and his horses to the number of 7, were forced from their stalls, feed-yards, and shelters, and exposed to cold storms, and to stand in snow, ice, and water for twenty-four days, without regular feed and care, and greatly reduced in flesh and condition, and injured to plaintiff's damage in this behalf \$400; his hay on said lands to the amount of ten tons was wet and destroyed to his damage in this behalf \$30; his labor and expense in endeavoring to save and care for said animals, and preserve his said property from the consequences of said overflow, amounted to not less than \$100; to his damage in this behalf \$100; and the plaintiff, in consequence of said overflow, was otherwise put to great expense, trouble, inconvenience, and hardship, and that the plaintiff's entire losses and damages in the premises are \$2,842.50. Wherefore the plaintiff prays judgment against the defendant for the sum of \$2,842.50 damages and costs."

The plaintiff in error contends that there is no sufficient allegation that the bridge was negligently constructed, and that it forms an unlawful obstruction in the Platte River. The allegations in the petition as to the negligent construction of the bridge, and that it forms an unlawful obstruction in the river, are not as definite as they might be made; but under the liberal rules of construction of the Code they will be held sufficient to justify a recovery. The plaintiff in error contends that the insertion of the words "or damaged" in sect. 21, art. 1, of the Constitution of 1875, restrict the right of recovery to such damages as may have been reasonably anticipated at the time the structure was erected. The rule contended for was not taken into consideration by the constitutional convention in amending the section named. It is a matter of regret that the proceedings of the constitutional convention were not published; but it is a matter of unwritten public history of this State that the section above quoted was reported by the committee having it in charge, without the words "or damaged" inserted therein. And the words "or damaged" were inserted in open convention, on

Eminent domain.
Effect of words "or damaged" in Constitution.

motion of a member, to cover a class of cases not embraced in the former section, as where no property of the party injured had been taken. It was intended to furnish an additional remedy, not to curtail or restrict any right which previously existed, and the language will not warrant the narrow construction contended for.

This action is brought to recover damages for a bridge, alleged to have been negligently and unlawfully constructed by the plaintiff in error across the Platte River, so as to form an unlawful obstruction and create a nuisance. In such case there could be no recovery until actual damages had been sustained. Thus, suppose the owner of

No recovery
until damages
were sustained.

the land at the time the bridge was built had brought an action, could he have recovered for anticipated overflow? We think not. There must be actual injuries resulting from the unlawful obstruction to justify a recovery. *Miller v. Railway Co.*, 16 N. W. Rep. 567; *Drake v. Railroad Co.*, 19 N. W. Rep. 215; *Cain v. Railroad Co.*, 3 N. W. Rep. 737. But it is contended that the plaintiff below being the grantee of Ballou, who owned the land when the bridge in question was constructed, the present owner cannot therefore recover. This position, however, is untenable. If the bridge in question is a nuisance, and an unlawful obstruction in the river, then every continuance of said nuisance is a new nuisance, for which, when damages have been

Action for
continuance
of nuisance.
Effect of one
recovery.

sustained, an action may be maintained, the recovery being limited to such damages as have accrued before the action was brought. *Beswick v. Combdon, Moore*, 353, 1 Cro. Eliz. 402, and *Penruddock's Case*, 5 Co. Rep. 205; 3 Bl. Comm. 220; *Rosewell v. Prior*, 2 Salk. 460; *Fay v. Prentice*, 1 C. B. 828; *Bowyer v. Cook*, 4 C. B. 236; *Holmes v. Wilson*, 10 Adol. & E. 503; *Thompson v. Gibson*, 7 Mees. & W. 456; *McConnel v. Kibbe*, 29 Ill. 483, 33 Ill. 175; *Staple v. Spring*, 10 Mass. 72; *Hodges v. Hodges*, 5 Metc. 205; *Baldwin v. Calkins*, 10 Wend. 167; *Beidelman v. Foulk*, 5 Watts, 308; *Blunt v. McCormick*, 3 Denio, 283; *Cumberland, etc., Corp. v. Hitchings*, 65 Me. 140; *Thayer v. Brooks*, 17 Ohio, 489; *Beach v. Crain*, 2 N. Y. 86; 1 Suth. Dam. 202; *Gould, Waters*, sect. 387. It is said, however, that one recovery will bar a future action. This, in many cases, no doubt is true; and if a railroad had been constructed along a street, in front of the plaintiff's property, whereby he sustained damages, one recovery would bar a future action for the same injury. But where damages result from a continuing nuisance, a different rule applies, and a recovery may be had for each injury as it occurs.

There was no error, therefore, in overruling the demurrer,

and the judgment of the court below is affirmed. Judgment accordingly.

Reese, J., concurs.

COBB, J. (*dissenting*). — I cannot concur in the conclusion of the majority of the court, or the reasoning of the chief justice by which it is reached. The case of Railroad Co. v. Brown, 14 Neb. 170, was an action for damages alleged to have been caused by the same bridge involved in the case at bar, in the spring of 1881. In that case the trial court instructed the jury, "that notwithstanding the fact that the railroad company, when it constructed its bridge, did so in a prudent manner, according to the best information it could obtain at the time of its construction, yet, if it subsequently appeared that its construction was such that damage would result from the gorging of ice against the bridge, and that damage did result to the plaintiff and other property-holders in the vicinity of the bridge by reason of the overflow of ice and water in consequence of said gorge, and the defendant had time and opportunity and means, by a reasonable effort on its part in that behalf, to avoid or prevent such damage, it was its duty so to do, and it was required to use all such reasonable efforts to avert such damages, and if it failed so to do, it is liable to plaintiff for the damages sustained by him as resulted directly from such failure." This court held the above instruction to be erroneous, and for that reason reversed the judgment of the District Court.

Railroad Co. v. Brown examined.

As I understand the petition in the case at bar, the *gravamen* of the charge against the railroad company is not the unskilful or negligent manner in which it built the bridge, but its negligence in failing to remove it, or change its construction when the ice-gorge was threatened, and it was notified thereof. If I am correct in this, and the instruction in the case above cited was wrong, and this court justified in so holding, then the petition in the case at bar fails to state a cause of action. But if it was the object of the pleader to attack the original construction of the bridge, I do not think the petition sufficiently intelligible as to whether it seeks to charge the railroad company with negligence in building a bridge at the point where they did, or in building the kind of a bridge which they did.

Gravamen of the charge. Negligent erection of bridge. Pleading.

The majority of the court, I think, understand the petition to charge the railroad company with keeping and maintaining a nuisance, in the bridge in question. Of course no one will contend that a railroad bridge across the Platte River, at or near the

site of this one, is a nuisance *per se*, or that it is not a great public necessity. Accordingly I think, that if it was the object of the pleader to charge the railroad company with the erection of a bridge in such a negligent and faulty manner as to be a nuisance, the petition should state by what fault of construction, which in the nature of things could have been avoided, the bridge became a nuisance.

My own view is, that if, in planning and constructing the said bridge, the railroad company brought to its execution the engineering knowledge and skill ordinarily practised in small works, and such knowledge and skill were practically applied to the building of said bridge, if the property of any person was damaged or became liable to damage, so that its value was depreciated by reason of the erection of such bridge, the case comes within the provision of the construction referred to in the opinion of the chief justice, that such damage should be compensated once for all, and that such bridge is not a nuisance. And I think that the burden of pleading, at least, was upon the plaintiff below, to show that the said bridge did not come within the above terms.

Property Injured but not Taken.—Owners of property adjoining a railroad are not usually entitled to damages for injury done to their property by the usual and necessary operation of the railroad. All damage done in this way is considered consequential, and is *damnum absque injuria*. See Colorado C. R. R. Co. v. Mollandin, 4 Colo. 154; Hyde Park v. Dunham, 85 Ill. 569; Patterson v. Chicago, D. & V. R. R. Co., 75 Ill. 588; Stetson v. Chicago & E. R. R. Co., 75 Ill. 74; Page v. Chicago, M. & St. P. R. R. Co., 70 Ill. 324; Nichols v. Somerset & K. R. R. Co., 43 Me. 356; Whittier v. Portland & K. R. R. Co., 38 Me. 26; Rogers v. Kennebec & P. R. R. Co., 35 Me. 319; Rochette v. Chicago, M. & St. P. R. R. Co., 32 Minn. 201; Shaubut v. St. Paul & S. C. R. R. Co., 21 Minn. 502; s. c., 17 Am. & Eng. R. R. Cas. 192; Thompson v. Androscoggin R. I. Co., 54 N. H. 545; s. c., 58 N. H. 108; Eaton v. Boston, C. & M. R. R. Co., 51 N. H. 504; s. c., 12 Am. Rep. 147; Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. (2 Stockt.) 352; Selden v. Delaware & H. C. Co., 29 N. Y. 634; Bellinger v. New York C. R. R. Co., 23 N. Y. 42; Arnold v. Hudson R. R. R. Co., 49 Barb. (N. Y.) 108; Struthers v. Dunkirk, W. & P. R. R. Co., 87 Pa. St. 282; Hornstein v. Atlantic & G. W. R. R. Co., 51 Pa. St. 87; Case of Philadelphia & T. R. R. Co., 6 Whart. (Pa.) 25; Richardson v. Vermont C. R. R. Co., 25 Vt. 465; s. c., 60 Am. Dec. 283; Alexander v. City of Milwaukee, 16 Wis. 247.

In some of the States, however, consequential damages are provided for by the Constitution or by the statute. In such cases the owner of the property injured though not taken is entitled to compensation. See Chicago & W. I. R. v. Ayres, 106 Ill. 511; Chicago v. Union B. Assoc., 102 Ill. 379; Rigney v. Chicago, 102 Ill. 64; Pittsburgh, Ft. W. & C. R. R. v. Reich, 101 Ill. 157; Chicago, M. & St. P. R. R. v. Hall, 90 Ill. 42; Brown v. Providence, W. & B. R. R. Co., 71 Mass. (5 Gray) 35; Dodge v. Essex, 44 Mass. (3 Metc.) 380; Republican Valley R. Co. v. Fellers, 16 Neb. 169; s. c., 29 Am. & Eng. R. R. Cas. 256; Gottschalk v. Chicago, B. & Q. R. R., 14 Neb. 550; Dearborn v. Boston, C. & M. R. R. Co., 24 N. H. 179; Clark v. Boston, C. & M. R. R. Co., 24 N. H. 114; Watson v. Pittsburgh & C. R. R. Co., 37 Pa. St. 469;

Schuykill Navigation Co. *v.* Thoburn, 7 Serg. & R. (Pa.) 411; Smith *v.* Gould, 61 Wis. 31; s. c., 5 Am. & Eng. Corp. Cas. 472.

See also Beseman *v.* Pennsylvania R. Co., 33 Am. & Eng. R. R. Cas. 107; Pennsylvania R. Co. *v.* Marchant, and note, 33 Ib. 116, 140.

GULF, COLORADO, & SANTA FÉ R. Co.

v.

POOL.

(*Texas Supreme Court, May 15, 1888.*)

Construction of Road — Embankment — Opening of Bridge. — Where a railroad company constructs an embankment as an approach to a bridge across a creek, it is the duty of the company to leave a sufficient opening for the water, caused by ordinary rains, flowing along the creek, and following the usual course, to escape, so as to prevent the same from causing any injury to the adjacent lands and crops; but the company is not bound to provide against damages caused by such extraordinary floods as would not have been reasonably foreseen by a man of ordinary engineering skill or sagacity.

Same — Overflow — Injury to Crops — Measure of Damages. — In an action to recover damages for injuries to crops, through an overflow caused by the negligent construction of an embankment, the measure of damages is the market value of the crops at the time they were destroyed, and the injuries to the land as shown by the testimony.¹

APPEAL from District Court, Bosque County.

Action by J. B. Pool against the Gulf, Colorado, & Santa Fé Railway Company for injuries to plaintiff's crops and land, caused by an overflow of water consequent upon the alleged negligent construction of a bridge and embankment. Defendant appeals from a verdict of judgment for the plaintiff. The facts sufficiently appear in the opinion.

W. M. Flourney for appellant.

WALKER, J. — Appellant was sued by appellee for damages for injury to his land, and crops of cotton and oats, adjoining the track of the railway of appellant, caused by alleged negligence in its construction of a bridge and an embankment north of the bridge, whereby the waters of Neil's Creek were swollen by rain, were thrown over the adjoining fields, washing away the soil, and destroying the growing crops thereon. The petition described the situation of the land,

Facts.

¹ OBSTRUCTION OF STREAM BY BRIDGE, thereby causing the flooding of adjacent property. — See *ante*, Omaha & R. V. R. Co. *v.* Standen, 179, and note 186.

the dimensions of the embankment, the want of culverts and sluices, and the width of space left at the bridge in its construction, and alleged defects; giving also a history of the effect floods had upon the land before the obstruction. The extent of injury to the land is set out, and the acreage, and value per acre of the crops alleged to have been destroyed. The demurrer and exceptions were overruled. The special exceptions applied to the details given, which might have been omitted; but their presence, as indicating the scope of the testimony to be introduced, could have been of no injury to the defendant. There was no material error, then, in overruling the exceptions.

Complaint is urged against the action of the court in interrupting counsel for defendant in the cross-examination of the

**Interruption
of cross-
examination
by the court.** witness Preston. The explanation given by the judge in the bill of exceptions must be taken as true, "that the court did say that the witness had already answered the question several times, and he thought that was often enough; he thought the witness had been cross-examined fully enough on that point. But the defendant had full liberty, and did continue the examination as to other matters. Counsel was stopped because he was persisting in interrogating the witness upon a matter about which he had answered fully several times." In the examination of witnesses the subject lies chiefly in the discretion of the judge before whom the cause is tried. The great object is, to elicit the truth from the witness; but the character, moral courage, bias, memory, and other circumstances of witnesses are so various as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to obtain that end. 1 Greenl. Ev. sect. 431. It does not appear that any injury resulted, or could have resulted, from the action of the judge, in the exercise of his duty, in directing the examination; and his action will not be revised. It was also within the discretion of the court to permit the plaintiff to be recalled to correct his evidence before given.

By the testimony plaintiff's case was, that the railroad track ran north through plaintiff's field, near the Bosque River on the east, and crossing Neil's Creek on plaintiff's land.

**Nature of
embankment.** The creek, at the bridge, ran at the foot of a hill on the south; the field rising gradually to the north and east. The bridge spanned the creek from the hill on the south to an embankment thrown up to support the track to the north. The embankment is variously estimated at $7\frac{1}{2}$ feet to 15 feet in height. The track from the bridge descended for a distance from 500 to 700 yards, then ran off on a level for about 250 yards, then began an upward grade. The embankment at the creek was only 18 inches or 2 feet high. The water broke

over the track about 500 yards from the bridge, and for about 250 yards the embankment and track were washed away; the water running with much force along the west side of the embankment north (or up hill, as stated by one witness), and making a passage eastward across the track, destroying totally about 40 acres of cotton on the west, and 14 acres of oats on the east of the track. On the west much soil was washed off; all the loose soil taking the cotton by its roots, leaving the surface in holes. The testimony was conflicting as to the dimensions of the opening at the bridge left for the passage of the waters of the creek. It was in evidence that the creek had been as high before in 1884, 1873, 1872, and 1870. The flood in 1884 was harmless, from the backwaters from the Bosque preventing any current. There were no culverts in the embankment. The court charged the jury "that it was the duty of the company to leave sufficient opening [at the track] for the water caused by ordinary rainfalls flowing along said creek, and following the usual course, to escape, so as to prevent the same from causing any injury to the plaintiff's land and crops. But defendant was only bound to provide against such damages as could have been reasonably anticipated, and would not be guilty of such culpable negligence as to make it responsible if it failed to provide against such extraordinary floods as would [not] have been reasonably foreseen by men of ordinary engineering skill and sagacity, required in the construction of such railroads in general. By the expression 'extraordinary floods,' as used herein, is meant such floods as are of such unusual occurrence, as could not have been foreseen by men of ordinary experience and ordinary prudence. Ordinary floods are those the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen." The liability of want of such care and skill was given. The measure of damages given in the charge was the market value of the cotton and oat crops at the time, if any, they were destroyed, and the injury to the land as shown by the testimony. The jury were also charged that "if they found from the testimony that the bridge and the embankment were properly constructed, having sufficient opening for the escape of the water from ordinary rainfalls, and sufficient culverts and sluices in said embankment for the escape of the water from such rainfalls, . . . or if the injury was caused by an extraordinary rainfall, to find for the defendant. The verdict was for \$600 damages to the land, and \$470 for the destruction of the cotton and oat crops. The court, in its general charge, gave the law applicable to the case as

Instruction as to liability for extraordinary floods.

Measure of damages for overflow.

made by the testimony. There was no error in rejecting the additional charges as to the duty and the degree of care and skill required by the defendant, and the conditions of its liability for damages. The rule for computing damages is not subject to criticism. *Railroad Co. v. Helsley*, 62 Tex. 596; *Railway Co. v. Tait*, 63 Tex. 223; *Railroad Co. v. Johnson*, 65 Tex. 393. The conflict in the testimony as to the sufficiency of the opening left at the crossing of the creek, whether the bridge and embankment were properly constructed, as to whether this was an extraordinary rainfall, as to the water actually breaking through the embankment, and the flood of water towards and through the break, the destruction and value of the crops, and the extent of the injury to the surface of the land, were all subjects to be passed upon by the jury. The absence of sluices and culverts, alleged in pleadings, and noticed in the charge of the court, could not have injured defendant. A failure to establish his case in part will not affect his rights upon what plaintiff was able to and did establish. The main facts were few, and seemingly well supported by testimony. The embankment did raise the water; the water broke through the embankment; a current flowed northward towards the break, taking the cotton and surface soil in its course, and covering the oat-field on the east of the embankment with mud. The creek had been as high before, and inquiry would have shown it; and ordinary care would have demanded, upon the information, that such floods should have been guarded against. We find no error. The judgment is affirmed.

Measure of Damages for the Overflow of Land. — See *Owens v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. R. Cas. 205, note, 209.

SABINE & EAST TEXAS R. CO.

v.

WOOD.

(*Texas Supreme Court, Feb. 7, 1888.*)

Construction of Road — Negligence — Flooding. — A railroad company, in the construction of its road, raised a solid embankment at some distance from the seashore. At the time of construction its engineer was informed that if the embankment was made solid, the waves would, during wind-storms

blowing towards the land, be carried over the land lying between the embankment and the shore, and that the water, instead of flowing into the back country, which was at a lower level, would be impeded by the embankment, and damage would consequently result to the building between the embankment and the shore. After the construction of the embankment a wind-storm occurred, during which the water was carried over the land as far as the embankment; and, its flow being impeded thereby, it was dammed back to a depth of four or five feet. *Held*, that the company was liable for damages caused through the construction of a solid instead of an open embankment.¹

APPEAL from Jefferson County District Court.

Action by R. L. Wood against the Sabine & East Texas Railroad Company to recover \$2,253.25 as damages for injuries to his person and property alleged to have been caused by reason of the defendant's negligence. Verdict for the plaintiff for \$1,200, and judgment thereon, from which defendant appeals. The facts are stated in the opinion.

O'Brien & John for appellant.

Tom J. Russell and *Hal W. Greer*, for appellee.

STAYTON, J. — This action was brought by the appellee to recover damages for the loss and destruction of personal property owned by him, and for injury done to his person, all of which he alleged resulted from the failure of the Facts. appellant properly to construct its railway near the town of Sabine Pass. The defendant alleged that its road-bed was properly constructed, and that the injury resulted from water driven upon the land by an unusually severe storm, "which the greatest care and skill in the construction of its road-grade could not have prepared against." The evidence shows that Sabine Pass is situated on the west side of Sabine Lake and Pass, and that the land there, and for a considerable distance above, is elevated only about two feet above the sea-level. The land back is perhaps lower, and for many miles into the interior the country presents this low, flat surface, over which, at times of high wind from the east and south-east, water from the lake, pass, and gulf spreads. The appellant constructed its road-bed some 1,200 or 1,500 feet west of the west bank of the pass, but at the town of Sabine Pass it approached near to the shore. Its road-bed, which consisted of an embankment of earth, was four or five feet high; and between this and the lake or pass a part of the town of Sabine Pass was situated. The appellant was living in a house in that part of the town which was destroyed by high water that came in during a high wind on June 14, 1886, and

¹ SURFACE WATER. — For general discussion of the doctrines of surface waters, see *ante*, Philadelphia, W. & B. R. Co. v. Davis, 143, and note 148-151.

DAMMING BACK WATER, liability for. — See *Olson v. St. Paul, W. & M. R. Co.*, *ante*, 154.

thus was his property destroyed, and personal injury received by himself. The evidence tends to show, that, prior to the construction of the railway, water frequently came over the land, but that it would flow into the back country, and not become deep; but that upon this occasion its flow was impeded by the railway embankment to such extent that between the railway and the shore the water became four or five feet deep, while there was but little water on the west side of the railway. The great weight of testimony tends to show that such winds and overflows had frequently occurred before the railway was built, but without injury to property; and there is some testimony tending to show that the company's engineer was informed that the embankment, if constructed solidly at such height, would bring about such results as ensued. The evidence renders it reasonably certain that the destruction of the house in which plaintiff's property was, as well as its loss and his injury, resulted from the accumulation and deepening of the water caused by the railway embankment, and that but for it the loss would not have occurred.

The court instructed the jury that it was the duty of the railway company, in the construction of its road-bed, "to use that degree of care and prudence in constructing its road-bed so as to provide against damages to such adjacent property as a prudent, cautious, and careful man would do to protect himself against damages to his own property." This charge was as favorable as the appellant could ask. The court, however, instructed the jury that if the appellant "constructed its road-bed or grade in such way and in such manner as to guard against ordinary freshets, overflows, tides, etc., so as to prevent damage therefrom to adjacent property, it would not be liable for damages arising from an extraordinary or unusual rise or overflow of water, such as could not have been foreseen or anticipated by the use of the greatest care, skill, and caution in the construction of its road-bed." It is urged that the giving of this charge was error. The charge certainly stated a correct rule; and, if the appellant was of the opinion that the exercise of a less degree of care would have relieved it from liability, a charge upon that subject should have been asked. If the charge had informed the jury that nothing less than the exercise of the highest skill, care, and caution would relieve the appellant from liability for an injury resulting from an extraordinary or unusual rise or overflow, a different question would arise. There is no reason to believe that the jury were misled, if they considered the entire charge.

It is claimed that the verdict of the jury was contrary to, and

not supported by, the evidence, in that it is claimed that the evidence clearly showed that the injury resulted from an extraordinary, sudden, and violent storm, which could not have been anticipated. The evidence is not of this character; to the contrary, it tends most strongly to show that such storms had frequently occurred before, and that, but for the want of proper care in the construction of the appellant's railway, injury, most probably, would not have resulted from such a storm.

Verdict supported by evidence.

There was an application for a new trial, based on testimony alleged to be newly discovered, which was overruled, and this is assigned as error. This evidence, as stated in the affidavit of the witness, was, "that he had lived at Sabine Pass from 1860 until 1869. . . . That in 1865, before the Sabine & East Texas road was built, there was a storm, when the water and wind together carried away houses located on the front of Sabine Pass, between the water of the pass and where the road-bed of defendant is now located. That he is acquainted with the situation and bearing of the pass, and that a wind blowing from the south-east would blow directly up the pass, and that houses on the front of the pass would be in a very exposed situation; and that the force of the wind and waves would not be affected when the wind is blowing from the south-east, by the railroad embankment of defendant. That he left Sabine Pass in 1869, and his residence on the front of the pass, on account of the exposed condition of said front." We do not see what advantage this evidence could have been to the defendant. In so far as admissible, it was cumulative; and the court would have been well justified in coming to the conclusion that such facts as the witness proposed to testify to were known, if true, by the residents of the town generally, and that the exercise of a slight degree of diligence would have obtained evidence of such facts. It is not shown what diligence was used to obtain the testimony of the witness.

New trial.
Newly discovered evidence.

There is no error in the judgment, and it will be affirmed.

OHIO & MISSISSIPPI R. Co.

v.

WACHTER.

(Illinois Supreme Court, Jan. 20, 1888.)

Construction of Road — Embankment — Culverts. — Where a railroad company constructs an embankment as part of its road-bed, it is bound to construct sufficient and substantial culverts so as to allow the escape of accumulating waters through them in times of high water as well as low.¹

Same — Sufficient Culverts — Damages. — A railroad company, by the payment of the compensation provided for, for injuries caused by the construction of its road-bed, does not escape liability to an owner of adjoining lands for damages caused by the improper and defective construction of the road-bed; e.g., by the construction of an insufficient culvert.

APPEAL from Appellate Court for the fourth district.

Action by Michael Wachter against Ohio & Mississippi Railway Company to recover damages for plaintiff. The cause is brought here by defendant on certificate from the Appellate Court.

Pollard & Werner for appellant.

W. C. Kueffner for appellee.

MULKEY, J. — This is an appeal from the Appellate Court for the fourth district, affirming a judgment of the Circuit Court of St. Clair County in favor of Michael Wachter, the appellee, against the Ohio & Mississippi Railway Company, the appellant herein, for the sum of \$600 and costs. The form of the action was trespass on the case. The first count charges "that the plaintiff, at the time of the alleged grievances, was the owner and in possession of a certain brick-yard, with certain property situate thereon, in the town of O'Fallon, in St. Clair County, near which defendant's railroad was operated, and which crossed a natural water-course; that defendant had constructed, and did unlawfully maintain, a certain solid earth embankment across said water-course, about twenty feet in height, which obstructed the natural flow of the water, and forced it back upon adjoining lands; that defendant had constructed, and was maintaining, a culvert through the embankment, which was utterly insufficient to permit the free passage of water, which in

¹ SURFACE WATERS. — For a full discussion of the question of surface water, see *ante*, Philadelphia, W. & B. R. Co. *v.* Davis, 143, and note 148-151.

ordinary floods and freshets would naturally flow in said water-course, and seek passage through the said culvert; that on or about June 20, 1885, a heavy rain-storm set in, and a large quantity of rain-water naturally fell upon the lands adjoining said water-course, and said water naturally was drained and ran into said water-course, and would have escaped and run off without damage to the plaintiff but for said embankment; but that said water was stopped by said embankment, and owing to the insufficiency and inadequacy of said culvert, and opening in said culvert, was prevented from passing off in its natural course, and forced back upon and flooded his brick-yard, and property thereon, to his great damage." The second count is substantially the same as the first, except that the negligence imputed to the defendant is its suffering the culvert to become choked up with obstructions, causing the water to back up and overflow the plaintiff's property. The third count charges that the defendant wrongfully and unlawfully constructed and maintained the levee without leaving a sufficient opening for the water to pass through the embankment. In other respects it was like the first and second. The defendant interposed the plea of not guilty, and upon this issue alone the cause was tried before the court and a jury, with the result already stated.

No exception was taken on the trial to any ruling of the court upon the admissibility or exclusion of evidence; and while we find exceptions were taken to the court's rulings upon the instructions, and that such rulings were assigned in the Appellate Court for error, we may assume this was done merely *pro forma*, for no objection to the instructions is urged in appellant's argument, or even so much as suggested. Not perceiving any objections ourselves to the instructions of which *the appellant can complain*, no discussion of them is called for, or could well be made.

Upon an examination of the record in the Appellate Court, we find there was a simple affirmance of the judgment of the trial court, without any finding of the facts by that court. In its opinion, however, there were questions — or, rather, a question — involved in the case of sufficient importance to certify the cause to this court, which it has accordingly done. As just indicated, that court has appended to its certificate the specific grounds upon which the appeal was granted. That, however, we regard as merely advisory, for the reason the statute did not require it. Yet in many cases, if not in this, such a statement, though not required as a matter of duty, might subserve a good purpose by directing the attention of this court to the particular features of the case which, in the opinion of that court, were not regarded

Appeal from
Appellate
Court.
Certificate.

as free from question. Nevertheless, whenever a case is brought from the Appellate Court to this upon a certificate, it is here as if brought in the usual way, for all purposes. In either case this court is required to consider such questions, and such only, as arose upon the record, and which it is by law authorized to determine. To ascertain what questions do thus arise, we look to the pleadings, the rulings of the court, and the orders in the cause, and not to the certificate of the Appellate Court allowing the appeal. Viewing the present record in this light, it is not clearly perceived that any thing remains for this court to do but simply to affirm the judgment, unless it were able to say, as matter of law, that the declaration discloses no cause of action; this being always a question open to consideration in a court of review when it falls within any of the assignments of errors. While there is no direct claim of this kind made, yet the question that appellant now asks us to consider, and which is the only one discussed in the brief filed by its counsel, seems to assert as much. Upon this view, therefore, it may not be improper to consider it.

The question or proposition as formulated by counsel is, "The injury caused by the construction of an insufficient culvert in a railroad embankment is immediate and permanent, giving rise to but one cause of action." Counsel have cited in support of the proposition the following authorities: *Gas Co. v. Graham*, 28 Ill. 73-78; *Railroad Co. v. Grabill*, 50 Ill. 241; *Railway Co. v. Morgan*, 72 Ill. 155; *Railroad Co. v. Stein*, 75 Ill. 42; *Railroad Co. v. Maher*, 91 Ill. 312; *Gas Co. v. Howell*, 92 Ill. 19; *Railroad Co. v. Loeb*, 118 Ill. 203; s. c., 27 Am. & Eng. R. R. Cas. 415; *Railway Co. v. McDougall*, 118 Ill. 229; 8 N. E. Rep. 678; *Railroad Co. v. McAuley*, 121 Ill. 160, — none of which, in our judgment, sustains it. The statement is not accurate as an abstract proposition; and, even if it were, it is not but in part applicable to facts of the case, and is inconsistent with the theory upon which it was tried by both parties. Considered as a general proposition, it should at least be limited to the case of a railroad built under authority of law, and in a reasonably proper and skillful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from thus building and operating the road. The proposition as formulated assumes that a railroad company has the right to construct and operate its road just as it pleases, without regard to whether the method adopted is sanctioned by good railroading or not; that it may build indifferent culverts, or none at all, over drains and streams on the line of its road, and, by thus disregarding the ordinary rules observed in such cases, inundate and overflow, in time of freshets, large bodies

Injury caused
by insufficient
culvert. Per-
manency of
injury.

of land and other property, without incurring any other or different liability, except as to extent of damages, than that of a company which, under like circumstances, has constructed its road-bed and culverts in strict conformity with the wise, recognized, and approved methods of railroad building. We do not concur in this view. The decisions of this court above cited, as we understand them, go to the length of holding that all special damages, present and prospective, to the owners of lands, resulting, or to result, from properly constructing, maintaining, and operating a railroad under the laws of this State, constitute, as to each land-owner, one single, indivisible cause of action, which may be enforced under the eminent domain Act or any other appropriate form of action. As a corollary of this doctrine, these cases further hold, that where, after such right of action has once accrued, the owner of land thus injured conveys it to another, the latter can maintain no action for any damages he may subsequently sustain which would have been anticipated and allowed as prospective damages in any suit which his grantor might have brought in his own name. But this court has never held, nor is it prepared to hold, that a railroad company is not liable for damages resulting from its negligence, either in the construction, maintaining, or operating its road. To do so would be to introduce an anomaly in the law of this State, and offer a premium for negligence and a wilful disregard of duty. A railroad company cannot take, even by making compensation, more land than is reasonably necessary for the purposes of its road. This is universally conceded. The same principle must be applied to the damaging of property; for to permanently damage it is practically taking it, to the extent to which its uses are impaired, though not a taking in the limited sense in which that term is used in our statute.

Public health and convenience, as well as the positive law of the State, alike demand that railways leading over natural streams and drains should, by means of efficient and substantial culverts or otherwise, be so constructed as to admit the escape of accumulating waters through them in times of high water as well as low. But experience shows that even these precautions, which the law requires to be observed, are often not sufficient to entirely protect adjacent property-owners; hence the Constitution of the State has expressly provided for compensation in such cases. But the providing of such compensation for unavoidable injuries to property was clearly never intended to license a company to overflow vast bodies of land which might be fully protected by the building and maintaining proper culverts. Now, in a case of this kind, where the company commences operating its road without

Same. Recovery
by land-owner
for injury.

having built such culverts, or provided some other efficient means for the escape of the waters, is it thereby relieved of the duty of doing so altogether? To say this is to assert one may discharge a legal duty by utterly disregarding it, which is simply absurd. To maintain an embankment of a road in that condition is not only a violation of a public duty, but is a direct invasion of the private rights of the owners of the lands thus constantly menaced by overflows which could never reach them if the road-bed were properly constructed. To the suggestion that the company may be compelled to pay for this constant menace, and consequent depreciation of the value and use of the land in times of overflows, it is sufficient to say that he is under no obligation to submit to a partial loss which could be avoided by the performance of a legal duty that the company owes to him. It is, in effect, forcing one to sell his property under the forms of law, in the absence of any public necessity justifying it. The remedy is, to compel the company to properly construct its road, and, until that is done, hold it responsible for all damages resulting from such failure of duty. There are decisions to the effect that where, in a case like this, the plaintiff has treated the injury as embracing prospective as well as present damages, and has offered proof in support of such claim, there can be no further recovery. These decisions rest upon the principle of estoppel, and are consequently sound; but no such question arises in this case. Yet it does not follow that because a land-owner, under the circumstances suggested, would be estopped from bringing a second suit, the company would be relieved of the public duty to properly construct and maintain its embankment; and it would therefore continue liable to all persons injured by its failure to do so, except such as might be estopped, in the manner we have stated, from enforcing a claim of that kind.

Judgment affirmed.

SABINE & EAST TEXAS R. CO.

v.

BROUSSARD.

(Texas Supreme Court, Feb. 3, 1888.)

Construction of Road — Negligence — Floods — Pleading. — In an action to recover damages for injuries to land from floods caused by the negligent construction of a railroad, allegations of injuries to adjoining land not belonging to plaintiff are properly stricken out.¹

Same — Death of Stock — Evidence — Opinion. — In an action to recover damages for the death of stock through a flood occasioned by defendant's negligence, a witness who has stated fully his means of information as to the loss of the stock, and shown that he was in a position to enable him to form an estimate, may give his opinion as to the number of dead animals, when no better evidence can be obtained.

Same — Flood — Injury to Pasture. — A recovery of damages for injury to pasture through a flood caused by another's negligence is not limited to the value of the grass actually destroyed by the overflow; but it may be shown that the pasture was rendered incapable, for a time after the water subsided, of producing grass, as it did before the overflow.

Same — Instruction — Repetition. — Where the court have fairly instructed the jury as to the extent of the defendant's liability, and have informed the jury that defendant would not be liable if the overflow resulted from extraordinarily heavy rains and high water in the river, against which ordinary prudence would not have provided, it is not necessary for the court to repeat such instruction in several paragraphs bearing upon the defendant's liability.

Same — Loss of Pasture — Instruction — Yearly Value. — In an action to recover damages for the loss of pasture, an instruction that the jury might find what, if any, was the value for one year, and then take the proportionate rate for the length of time which the evidence showed plaintiff was deprived of his pasture, is erroneous where it appears that the value of the pasture varied at different seasons of the year.

APPEAL from District Court, Hardin County.

Action by Moise Broussard to recover damages to plaintiff's stock, grass, and pasturage, sustained through an overflow caused by the negligent construction of the works of the Sabine & East Texas Railway Company. Verdict and judgment for plaintiff, from which defendant appeals.

O'Brien & John for appellant.

Tom J. Russell for appellee.

¹ SURFACE WATERS. — For a full discussion of the doctrines as to surface waters, see *ante*, Philadelphia, W. & B. R. Co. v. Davis, 143, and note 148-151.

DAMMING BACK WATER, and preventing flow. — See *ante*, Olson v. St. Paul, M. & M. R. Co., 154; Sabine & E. Tex. R. Co. v. Wood, 190.

STAYTON, J. — At the proper time objections were taken to three depositions offered by the appellee. The objection to each deposition was, that the certificate of the officer before whom it was taken did not show that the answers of the witness were signed and sworn to by him. As shown by the bill of exceptions, the captions and certificates to the depositions were as follows: Style of cause, and "Answers of Bradley Johnson to Direct Interrogatories in the above Suit," with no certificate of officer to them. The caption to his answers to cross-interrogatories was, "Answers to Cross-Interrogatories." The certificate to same was as follows: "I, G. W. Paine, a justice of the peace in and for precinct No. 3, and *ex-officio* notary public of said county and State, do hereby certify, under my hand and official seal, that the foregoing answers were made, subscribed, and sworn to before me at Sabine Pass, Jefferson County, and State of Texas, on this fourth day of April, A.D. 1887. [Signed by the officer.]" The caption to the deposition of Cuniff was as follows: After style of cause, "Deposition of Thomas Cuniff, Witness for Plaintiff." The deposition was without signature of witness or certificate of officer to the direct interrogatories. The answers to the cross-interrogatories had no caption, save, beginning with the style of the cause, "Answers of Thomas Cuniff to Cross-Interrogatory 1st," and ended with a certificate of same form as the one to B. Johnson's deposition; to wit, "That the above and foregoing answers to the direct and cross interrogatories were made, subscribed, and sworn to before me at," etc. And the said deposition of Jack Johnson, after the style of the cause, had this further caption: "Answers of Jack Johnson, Witness for Plaintiff, to Direct and Cross Interrogatories." The direct interrogatories were signed by the witness. There were no answers to the cross-interrogatories, and the certificate was in the same form as the foregoing: "That the above and foregoing answers were made, subscribed, and sworn to before me at," etc.

The statute declares that "the officer shall certify that the answers of the witness were signed and sworn to by the witness before him." Rev. St. art. 2229. This must be substantially complied with, or a deposition should be excluded, on motion made at the proper time. Do the certificates before us show the facts required by the statute to be shown? They are all so nearly alike, that the consideration of one will dispose of all. Where it is apparent that the caption is intended as a part of the officer's certificate, it doubtless may be so considered; and if it clearly appears from that, taken with the certificate at the conclusion of a deposition, that the law has been complied with, that is sufficient. That which precedes the answers which are claimed

to have been those of Bradley Johnson does not show that he signed them or swore to them ; and, if there be evidence that those things were done by the witness named, this must appear from the officer's certificate which follows the deposition. The only way in which it can be known that what appears to be the answers of a witness, taken through interrogatories and a commission, within the meaning of the law, are such answers, is by the certificate of the officer to the facts that the answers of the witness were signed and sworn to by the witness before him. That which is thus verified becomes evidence ; but no statement made by the officer that matters appearing as the answers of a witness are his answers, which does not show that they became so by the facts that the witness signed and swore to them before the officer, can be received. If we take what is stated in the caption to the deposition of Bradley Johnson, and attach to it the certificate of the officer which follows, it will stand thus : "Answers of Bradley Johnson to Direct Interrogatories in the above Suit. I, G. W. Paine, a justice of the peace in and for precinct No. 3, and *ex-officio* notary public of said county and State, do hereby certify, under my hand and official seal, that the foregoing answers were made, subscribed, and sworn to before me at Sabine Pass, Jefferson County and State of Texas, on this fourth day of April, A.D. 1887." From this it may be suspected that the answers were signed and sworn to by Bradley Johnson ; but this is not enough. It must appear through the officer's certificate that this is true, or the deposition should be rejected. *Thompson v. Hale*, 12 Tex. 139 ; *Chapman v. Allen*, 15 Tex. 278 ; *Patton v. King*, 26 Tex. 687 ; *Trammell v. McDade*, 29 Tex. 360. The three depositions objected to should have been rejected ; and, as the evidence was material, the judgment will have to be reversed on account of its admission.

There are many assignments of error ; and, in view of the further disposition of the case, we deem it proper to notice some of them. There were many exceptions taken to the petition, which were overruled. The petition was unusually full in its statement of the facts from which it was claimed the liability of the defendant arose, and of the facts evidencing the extent of the injury received by the plaintiff ; but this was notim proper, although it was, to a given extent, practically a statement of the particular facts which the plaintiff proposed to prove, more minutely made than was absolutely necessary. Averments as to the overflow of lands adjoining those of the plaintiff, but belonging to other persons, could have no bearing on the questions at issue between the parties to this action, and should have been stricken out on exception. The other exceptions to the petition were properly overruled.

Averments as
to overflow
of adjoining
lands.

The witness Johnson stated fully his means of information as to the loss of stock in plaintiff's pasture, and stated what he saw; and we are of the opinion, looking to all the facts of the case, that the court did not err in permitting him to estimate the number of dead animals. It is sometimes the case that no better evidence can be obtained upon questions relating to time, quantity, number, speed, distance, and the like; and when this is so, such evidence, derived from actual observation, is very generally held admissible. Such evidence, however, should never be received unless the witness is shown to have been in a position, and to have used the means necessary, to enable him to form an estimate.

Loss of stock.
Evidence.
Opinion.

The evidence of the witnesses Broussard, Ben Johnson, John Johnson, Bradley Johnson, and Thomas Cuniff, tending to show the number and value of animals belonging to the plaintiff that died, and the cause of their deaths, was clearly admissible; as was the evidence tending to show the value of grass in plaintiff's pasture destroyed by the overflow, as well as the injury resulting from the fact that, the land being long submerged, it was rendered incapable for a time, after the water subsided, of producing grass as it did before the overflow.

It is urged that the court erred in not instructing the jury that the measure of damage for injury done to the pasture was the value of the grass at the time the overflow came over it. In cases in which the destruction of grass is the basis of the action, no further injury being alleged, the rule contended for would be the true one. Such a rule, however, would not be applicable to such a case as is made in the petition in this case. It is claimed, not only that the grass on the land at the time the overflow came on was destroyed, but that the water remained over the land for several months, thereby preventing the growth of grass, and use of the pasture; and, in addition to this, that, after the water subsided, on account of its long continuance, the earth did not yield its grasses for a time as it had before, and would have continued to do if the land had not thus been submerged.

**Injury to
pasture.**
**Measure of
damage.**

The charge clearly stated to the jury what facts would render the appellant liable, and informed the jury, in terms that could not have been misunderstood, that the appellee would not be entitled to recover for any injury he might have avoided by the exercise of due care. The charge also clearly informed the jury that the appellant would not be liable, if the overflow resulted from extraordinarily heavy rains and high water in the rivers, against which ordinary prudence could not have provided; and that this was not repeated in every paragraph of the charge which bore on the question of the appellant's liability, could not have misled any jury of ordinary intelligence.

There being evidence such as would have enabled the jury to make estimates of damages in the manner suggested in the charge we now quote, the court gave this charge: "If they found for plaintiff, to determine the amount of damage, if any has been shown you, and to inquire whether, from the evidence, any injury is shown to plaintiff's pasture, if they found the standing water, as before explained, covered it; to find what, if any, the evidence showed them was the value per acre of the land for pasturage of horses and cattle during the year 1885; that they might find what, if any, was the value for one year, and then take the proportionate rate for the length of time, if any, the evidence showed them the plaintiff was deprived of his pasture; or that they might find the value of the use of the land for pasturage, if any be shown by the evidence, for one day, week, or month, if any be shown, and to that add, if any be shown by the evidence, the number of days, weeks, and months, if any, as was shown, and arrive at the amount of time, if any, plaintiff was deprived of his pasturage." A charge of this kind is objectionable in any case; and it is always better to leave the jury to reach their conclusions, under the evidence properly before them, and the charge of the court as to the law of the case, through such modes of reasoning and processes of thought as each juror may, unaided by suggestions from the court, naturally and without constraint pursue. In this case, the charge, however, was calculated to mislead; for it assumes that the value of pasturage is the same for any period during the year. The court could not judicially know this to be true; and it may be that pasturage for a given time in one part of a year will be of less or greater value than it would be for a like time during some other part of the year. The evidence tends to show that this was true.

The other assignments of error need not be considered.

For the errors noticed the judgment will be reversed, and the cause remanded.

Measure of Damages for Injury to Property caused by Overflow.— See *Gulf, Colorado, & Santa Fé R. Co. v. Pool*, *ante*, 187, and note 190.

WALDROP

v.

GREENVILLE, L. & S. R. Co.

(South Carolina Supreme Court, March 1, 1888.)

Culvert — Insufficiency — Negligence — Crops on Right of Way. — In an action to recover damages for injuries to a growing crop sustained through a flooding of the same, caused by a defective culvert in the road-bed of defendant's track, a question asked the plaintiff on cross-examination, "How much of the crop damaged was planted within a hundred feet of the railroad track?" is properly allowed where defendant had pleaded that injury to crops growing on its right of way could not sustain an action.

Same — Evidence — Declarations of Servant — Scope of Employment. — The duties of a section master are limited to keeping the track in order for the safety of trains, and declarations made by him concerning the sufficiency of a culvert not falling within the scope of his duties are inadmissible, in an action for damages for the overflow of land.

Same — Evidence of Damage — Nonsuit. — In such action, although plaintiff may have testified to the defective character of the road-bed and culvert, the accumulation of water in consequence, and the overflow and injuries of his land and crops, a nonsuit is properly granted if he fails to introduce in evidence as to the amount of his loss; and an averment in the answer that plaintiff had agreed to take, and defendant to pay, five dollars in satisfaction of all damages before the suit, is not sufficient to send the case to the jury.

Surface Waters — Obstruction by Lower Proprietor. — *Semble* that the proprietor of lower lands cannot obstruct the flow of surface waters across his lands from the lands of an adjoining higher proprietor, except when there is a necessity for its exercise in the proper enjoyment of the ownership of the property for the protection of which it is exercised, and there is no reasonable way of preventing the injury.¹

APPEAL from Common Pleas Circuit Court, Abbeville County.

Action to recover damages for an injury to land and crops. Plaintiff appeals from a nonsuit ordered upon defendant's motion. The facts are stated in the opinion.

Graydon & Graydon for appellant.

Fos. Ganahl and *Eugene B. Gary* for respondent.

SIMPSON, C. J. — The appellant brought the action below to recover damages for an injury to his land and crops, alleged to have been occasioned by a defectively constructed road-bed and an insufficient culvert, by reason of which water, instead of flowing off naturally, had accumulated

¹ SURFACE WATERS — DAMAGES FOR OBSTRUCTING FLOW OF. — See full discussion of the question of surface waters and the rights of lower and adjacent owners in *Philadelphia, W. & B. R. Co. v. Davis*, *ante*, 143, and note 148-151.

and overflowed his land, rendering the same unfit for cultivation, and injuring his crop growing thereon. Upon the close of appellant's testimony, on motion of respondent, his Honor Judge Fraser granted a nonsuit in a short order, of which the following is a copy: "At the close of plaintiff's testimony in the above-stated case, the defendant having moved for a nonsuit on the ground of failure of proof on the part of the plaintiff, and it appearing to the court that the motion should be granted; now, on motion . . . defendant's attorneys, it is ordered that the plaintiff be nonsuited, and the complaint herein be dismissed." The appeal questions the correctness of this order, upon several grounds; to wit, "(1) Because it was error in his honor to permit defendant's attorneys to ask, and to require plaintiff upon cross-examination to answer, the following question: 'How much of corn and cotton which you claim to have been damaged was planted within one hundred feet of the railroad track?' (2) Because it was error in his honor to refuse to allow plaintiff to state what he said to the section-master having in charge the piece of the road which runs through the plaintiff's land, and what reply the section-master made. (3) Because he was in error in holding, at the conclusion of plaintiff's testimony, that there was no evidence to go to the jury, and granted a nonsuit. (4) Because it was error in his honor, after the testimony was taken, to grant the order of nonsuit; the said order being in all respects contrary to law and the evidence taken upon the trial."

**Nonsuit.
Grounds of
objection to
order.**

The appellant alleged, in his complaint, damage to his growing crop, and in his direct examination had testified that said crop consisted of both cotton and corn, and we don't see that defendant's question as to the location of the crop — whether within one hundred feet of the track or not — was incompetent. One ground of the defence was, substantially, that injury to crops growing on the respondent's right of way could not sustain the action; and it seems to us to have been a very pertinent question, after appellant had testified that his crop had been injured, for respondent to ask whether said crop was within the right of way or not.

**Evidence.
Question as to
location of
crop.**

As to exception 2. It is true that a section-master is the representative of the company within the scope of his agency and duties, and what he says and does within that limit will generally bind the company; but the exclusion of the testimony referred to in this exception does not appear to have violated this rule. The section-master, as we understand, is charged with keeping the track in order for the safety of the trains; and the conversation here between the appellant and the section-master, proposed to be introduced, did

**Declarations of
section-master.**

not seem to have any reference to the track within the scope of the section-master's duties, to wit, as to its safety for the trains, etc.

This brings us to the order of nonsuit. A nonsuit is proper when there is a total failure of testimony as to one or more of the material allegations in the complaint, which, as we have often said, is a question for the judge who hears the case. If there be testimony as to all of the material allegations, the force and effect of which must be determined, the case must go to the jury; but if there be an absence of all evidence as to any one or more of such allegations, then a nonsuit must follow. Now, here the material allegations, and upon which the parties were at issue, were, that by a defective culvert, constructed by defendant upon plaintiff's land, water, which but for said road-bed would have flowed off naturally, accumulated, and, by overflowing plaintiff's land, had injured it and his growing crop in the sum of \$75. Analyzed, these are the issues: (1) The character of the road-bed and culvert; (2) the accumulation of water in consequence, which otherwise would have flowed off; (3) overflowing and injuring appellant's land and crops, one or both; and (4) a pecuniary loss of some definite amount. Now, the order of nonsuit does not state distinctly which of these allegations was without testimony. It simply states, in general terms, that defendant having moved for a nonsuit on the ground of failure of proof on the part of the plaintiff, and it appearing to the court the motion should be granted, it is ordered, etc. The plaintiff (appellant) was the only witness examined, and we find in his examination some testimony as to all of these issues except the last. He gave it as his opinion that the culvert was insufficient to carry off the water, and he described the culvert. He stated that the water had backed, and covered some of the land, had seeped through, and injured his crop on the other side of the track. This, perhaps, would have been enough to carry the case to the jury as to these matters; and, if there had been any testimony as to the last allegation, then the case no doubt would have gone to the jury. The last allegation was a pecuniary loss of some definite amount, and to entitle it to go to the jury there should have been some testimony directed to such loss, and by means of which the jury could estimate it in dollars and cents. True, the appellant said, generally, his land and crops had been injured; but as to the extent of the injury in money no evidence was furnished, and if the case had gone to the jury in the absence of such testimony, we do not see how a verdict could have been rendered as to that question. The appellant stated the usual price of corn and of cotton, and the probable production of his surrounding lands not

injured by the water; but as to the precise point in issue, to wit, whether the appellant had lost any thing, and, if so, how much, by failing to cultivate the land in question, there was no direct evidence, nor any collateral facts from which an inference might be drawn; the whole matter being left to speculation, based, not upon sworn testimony, such as the law requires, but upon the supposed knowledge of the jury of agricultural matters. We do not think the averment in the answer of defendant, that plaintiff had at one time before suit agreed to take five dollars in satisfaction of all damages, and that defendant had agreed to pay this sum, should be construed into an acknowledgment by defendant that damages to that extent at least had been done. A party sometimes prefers to buy his peace rather than to litigate for it. A very important and interesting question was raised in the argument before us in this case, involving the point whether, if the injury complained of here resulted from the action of surface water, as contradistinguished from a running stream with distinct channel, any action accrued to the plaintiff. It did not appear distinctly in the complaint whether the water was from a running stream, or was surface water; nor does it appear that his honor made any positive ruling on the question suggested. All that appears is found in his honor's remarks on a proposed amendment of the defendant to the "case" prepared by the plaintiff for appeal. The defendant proposed to amend by inserting that plaintiff said in his testimony, "There was no running stream of water, but the damage was done by surface water." His honor declined to allow the amendment, but stated that he was satisfied that it appeared in the evidence there was no running stream, and that the damage complained of was done by surface water, and that this was one of the grounds of the motion of nonsuit. He further said, that if the fact had been otherwise . . . he would have sustained the demurrer; meaning, we suppose, that, had it appeared in the complaint that the injury was from surface water, he would have sustained a demurrer. This being all that occurred below in reference to this question, so far as we know from the "case," it does not seem that his honor made any distinct ruling upon it. He does not state that his order of nonsuit was based on it; he simply says it was one of the grounds of the motion. Nor did he make any positive ruling involving this question upon the demurrer, — if there was a demurrer interposed, as to which the "case" is silent; he only states, that, had it appeared in the complaint that it was surface water complained of, he would have sustained the demurrer. Under these circumstances, and inasmuch as our province is limited in cases at law to the review of rulings below, in order to correct errors of law in such rulings, if any, there being no distinct ruling here below, we do not

regard this question as fully before us. What we say, therefore, is not intended as a final adjudication, and conclusive, of said question in the future, but is only intended as an examination of respondent's propositions in the argument here, — that the nonsuit may be sustained on the ground that his honor, seeing that the injury complained of resulted from surface water, ordered the nonsuit because, in his opinion, such an injury was *damnum absque injuria*, and therefore constituting no cause of action. This question, although it has been oftentimes before the courts in many of the States of this country, and most elaborately discussed therein, yet this is the first time it has ever been raised in this State, so far as we have been able to ascertain.

Obstruction of
surface water
by lower pro-
prietor.

In the different States in which it has been adjudicated, the decisions have by no means been in accord. In some of the States a principle said to have been derived from the civil law has been adopted and applied; to wit, that where lands are adjoining, one with a higher elevation than the other, the natural flow of the surface water of the higher, arising from rains, melting snows, or otherwise, cannot be disturbed by the proprietor of either of the lands to the injury of the other. In other words, while the proprietor of the upper lands may draw the surface water on his own lands, as his interests or desires may dictate, so long as he keeps it within his own lands, yet he has no right to collect it on his own lands, and throw it in increased quantity upon the lower adjoining lands to the injury of such lands; nor has the owner of the lower lands, by embankments or other artificial means, the right to stop the flow of the surface water from the higher lands, and thus throw it back upon the latter, to the injury of such lands. This seems to be the result of the decisions in Pennsylvania, Iowa, Georgia, and Illinois, and perhaps other States. *Livingston v. McDonald*, 21 Iowa, 160; *Gillham v. Railroad Co.*, 49 Ill. 484; *Kauffman v. Griesemer*, 26 Pa. St. 407; *Martin v. Riddle*, Id. 415. In some of the other States it has been held, in accordance with what is said to be the rigid common law, that surface water, like a common enemy, may be fought off by the proprietors of lands adjoining like those suggested above, as the interests of each may require, and without regard to the interests of the other; that the lower land owes no servitude to the higher to discharge the waters falling thereon as in a state of nature, forbidding the owner from erecting mounds, embankments, or ditches to protect himself, though by such means the water is thrown back upon the higher lands with injury; the courts holding in these States that such injury is unactionable, on the ground that action in such cases would interfere with and limit the rightful dominion of ownership. This seems to be the

rule in Massachusetts, New Jersey, New Hampshire, and Wisconsin. See *Kearney v. Railroad Corp.*, 9 Cush. 111; *Parks v. Newport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Pettigrew v. Evansville*, 25 Wis. 223; *Swett v. Cutts*, 50 N. H. 439; *Bowlsby v. Speer*, 31 N. J. Law, 351. In some of the other States a medium principle has been adopted, which makes the right to disturb the natural flow of surface water, by the owners of lands situated as above suggested, depend somewhat upon the facts and circumstances of each case; the right, as a general rule, existing when there is a necessity for its exercise to the proper enjoyment of the ownership of the property for the protection of which it is exercised, and there is no reasonable way of preventing the injury; and not existing where no such reasonable necessity is present, or where the injury inflicted could have been inexpensively and easily prevented. See well-considered case of *Railway Co. v. Chapman*, 39 Ark. 478; *Railroad Co. v. Wicker*, 74 N. C. 220; and *Barkley v. Wilcox*, 86 N. Y. 144. See also Washb. Easem. (3d ed.) 353 *et seq.* Without going into the argument now, as to which of these principles should be adopted in our State, and without announcing any final adjudication thereon in this case, the nonsuit herein having been sustained upon another ground, rendering such adjudication unnecessary, even if the question here was distinctly raised in the pleadings and rulings below, which is at least doubtful, it is sufficient for us to say, as at present advised, and as applicable to respondent's position in support of the nonsuit, that we think the medium line referred to above has the strongest foundation, being based as it is upon that great underlying principle which is the basis of all just laws in reference to the exercise of ownership of property, and which alone harmonizes such exercise on the part of each, with similar rights in others with whom they may come in contact, to wit, *sic utere tuo ut alienum non lædas*, unless there be some overruling necessity otherwise. Where railroads have been constructed in the different States, they have been regarded as occupying the relation of adjoining lands to such lands as they run through, and the principles hereinabove set out have been applied, dependent upon the ruling doctrine in the State in which the question was raised.

It is the judgment of this court that the judgment below be affirmed.

McIver and McGowan, JJ., concur.

GULF, COLORADO, & SANTA FE R. Co.

v.

MCGOWAN.

(Texas Supreme Court, March 27, 1888.)

Construction of Road — Injuries to Crops — Pleading — Proof. — In a suit to recover damages for the destruction of crops, where the plaintiff alleges that such crops were planted, cultivated, and owned at the time of the destruction by himself and his tenant, and that he had obtained, by transfer, his tenant's claim for damages prior to bringing the suit, the plaintiff's recovery is limited to such crops as the tenant at the time of the destruction had an interest in, and evidence of the destruction of crops in which the tenant never had been interested is inadmissible.

Same — Diversion of Stream — Complaint — Variance. — In such action, where the specific acts alleged in the petition are the negligent construction of the road-bed adjoining the lands upon which the crops were growing, evidence that defendant's road-bed was negligently constructed at a point six or seven miles above plaintiff's farm, which caused the water to flow back across the channel of the river and onto plaintiff's land, is inadmissible.

APPEAL from Galveston County District Court.

Action to recover damages for the destruction of crops. Judgment for the plaintiff, from which the defendant appeals. The facts sufficiently appear from the opinion.

J. W. Terry for appellant.

W. B. Denson and *Burnett & Hanscom* for appellee.

ACKER, J. — This suit was brought by appellee to recover damages for the destruction of crops planted, cultivated, and owned, at the time of the destruction, by him and his tenant,

Facts. George Moore; he having obtained by transfer Moore's claim for damages prior to bringing the suit. The crops are alleged to have been destroyed in the years 1884 and 1885, in consequence of the fault, carelessness, gross negligence, wrongful acts, and omissions of appellant in so constructing its road-bed, it being below and on the lower side of said land, as to obstruct the natural flow of the water according to the lay of the land, and to dam it up and throw it back and hold it upon said land; and, had defendant provided said road-bed at that point with sufficient culverts and drains, the overflows and destruction of crops would not have occurred. It is alleged that 172 acres of crops of various kinds were destroyed in 1884, and that 145 acres of various crops were destroyed in 1885.

It appears from the testimony of appellee that the crops

cultivated and owned by appellee in connection with his tenant, Moore, were, in 1884, about 70 acres, and in 1885 about 100 acres. On the trial appellee was permitted to prove, over objections of appellant, the destruction of crops by overflow in the years 1884 and 1885, in which the tenant, George Moore, was not interested, and had no connection with the planting or cultivation of; and this is complained of as error "because the petition did not warrant the introduction of such evidence, the petition alleging that the crops were cultivated by plaintiff in connection with his tenant, George Moore, and that at the dates of the respective overflows plaintiff and his said tenant had in cultivation the different crops mentioned in the petition, including all of them; and, such allegations being descriptive of the cause of action, evidence only of crops that were cultivated by plaintiff and George Moore was admissible." It is an elementary principle that the allegations in pleadings must be sufficiently broad to admit the proof necessary to sustain the action, and evidence unsupported by the allegations cannot sustain a judgment. The proof must be according to the allegations; and if it goes beyond, the court cannot act upon and give judgment upon that evidence which goes beyond the allegations. The case made by the petition is the case that the defendant is cited to answer, and the one which, presumably, he comes prepared to answer. We find in the petition no averment indicating a purpose to charge appellant with the destruction of crops other than those cultivated by appellee in connection with his tenant, Moore. It is reasonably clear to us that the averments are descriptive of the cause of action, and that the evidence should have been limited thereto. 1 Greenl. Ev. sect. 63; *Hall v. Jackson*, 3 Tex. 309; *Young v. Lewis*, 9 Tex. 77; *Chrisman v. Miller*, 15 Tex. 160; *Denison v. League*, 16 Tex. 408; *Parker v. Beavers*, 19 Tex. 410; *Stachel v. Peirce*, 28 Tex. 334; *White v. Moseley*, 5 Pick. 230; *Shaw v. Wrigley*, 2 East, 500. But if there was doubt upon that point, it should be resolved against appellee; for, construing the allegations most strongly against him, it certainly does not appear that the cause of action embraces any crops not cultivated in connection with the tenant, Moore.

Pleading and
proof.
Variance.

It is contended that the court erred in permitting appellee to prove, over objections of appellant, that the road-bed was negligently constructed, and without sufficient culverts, at a point six or seven miles above appellee's farms, which caused the water to flow back across the channel of the river and onto the land upon which the crops were growing, because the specific acts of negligence alleged in the petition were the negligent construc-

Evidence of
negligent con-
struction six
miles away.

tion of the road-bed and embankment south of and adjoining the lands on which the crops were growing, and the failure to construct sufficient culverts and drains at that point. We think the evidence should have been confined to the negligent acts and omissions alleged, proof of which would have been sufficient; for we think it immaterial how the water came upon the land, if, as alleged, the crops were destroyed by the water being dammed, backed up, and held upon the land, and it was so dammed, backed up, and held in consequence of the negligent construction of the road-bed south of the land on which the crops were. The evidence was improperly admitted, and may have influenced the jury. *Price v. Railroad Co.*, 3 Am. & Eng. R. R. Cas. 365; *Batterson v. Railway Co.*, 8 Am. & Eng. R. R. Cas. 123; *Waldhiser v. Railroad Co.*, 71 Mo. 514; s. c., 2 Am. & Eng. R. R. Cas. 146.

Because of the errors indicated, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. — Report of commission of appeals examined, opinion adopted, judgment reversed, and cause remanded.

TERRE HAUTE & INDIANAPOLIS R. CO.

v.

MCCOY.

(*Indiana Supreme Court, March 1, 1888.*)

Culvert — Failure to repair — Complaint — Demurrer. — In an action by a land-owner to recover damages for injuries sustained through the flooding of his lands, and injury to a private crossing in consequence of the stopping-up of culverts, the complaint is sufficient on demurrer where some of the acts and omissions charged as wrongful are alleged to have occurred since plaintiff became the owner of the land.¹

APPEAL from Montgomery Circuit Court.

Action by George W. McCoy against the Terre Haute & Indianapolis Railroad Company to recover damages for injuries

¹ DAMAGES FROM FLOODING. — As to damages sustained by land-owner for flooding of his lands, see *ante*, *Sabine & E. Tex. R. Co. v. Broussard*, 199; *Sabine & E. Tex. R. Co. v. Wood*, 190; *Olson v. St. Paul, M. & M. R. Co.*, 152, 154, and note 156.

to land. Judgment for plaintiff, from which defendant appeals. The facts are stated in the opinion.

John G. Williams for appellant.

Ballard & Clodfelter for appellee.

ZOLLARS, J. — The evidence shows that in 1871 appellant's railroad was built across the land which appellee became the owner of in 1882. There is evidence tending to show, that, since appellee became the owner of the land, appellant has dug ditches, and suffered culverts, as outlets for water, to become stopped up, whereby his land has been flooded with water, and a private crossing injured, and thereby damages resulted to him. The court, by its instructions, limited the right to recover damages on the part of appellee to the wrongful acts and neglects of appellant since appellee became the owner of the land. The jury returned a verdict for \$50, and for that amount the court rendered judgment against appellant. The contention on the part of appellant's counsel is, that the judgment should be reversed, because, as he claims, there are no averments in the complaint under which damages may be claimed for acts and neglects on the part of appellant since appellee became the owner of the land, and that for acts and neglects prior to that time appellee cannot recover. He also contends that the complaint is bad upon demurrer, for the reason that it shows upon its face that all of the acts and neglects complained of were done and occurred before appellee became the owner of the land. It is further said that the theory of the complaint is, that appellee may recover for alleged wrongful acts and omissions preceding his ownership of the land.

Facts.

Contention of
appellant.

We have examined both paragraphs of the complaint carefully, and are not prepared to adopt the construction of them urged by appellant's counsel. It is difficult to determine just what the theory is upon which the complaint was constructed. Some of its averments show that a portion of the injuries complained of are the results of alleged wrongs which must have been committed before appellee became the owner of the land. Other averments show that some of the injuries complained of, and the resulting damages, must have been the results of acts and omissions on the part of appellant since appellee became the owner of the land. Other averments are so indefinite and uncertain as to the time of the alleged wrongs and omissions, that it cannot be determined whether they were done and occurred before or since appellee became the owner of the land.

Theory upon
which com-
plaint is con-
structed.

It is not contended, in the argument by appellant's counsel,

that the proof does not show, or tend to show, that appellant has been guilty of acts and omissions since appellee has been the owner of the land; nor that for the injuries resulting from such acts and omissions he may not recover, if the complaint is broad enough to cover them. The contention is, as we have seen, that such damages cannot be recovered because the complaint does not show that any of the alleged acts and omissions upon which the claim for damages is predicated were subsequent to appellee's ownership of the land. We think that it does.

Appellant's counsel, as already stated, contend that appellee cannot recover on account of acts and omissions of appellant before he became the owner of the land, nor on account of injuries resulting from the proper operation of the road.

We need not extend this opinion to decide the questions thus presented, for the reason that the court, as we have stated, in its instructions to the jury, limited appellee's right to recover to wrongful acts and omissions on the part of appellant, if any, since he became the owner of the land.

All that we need determine here is, that, as against the demurrer, the first paragraph of the complaint is good, for the reason that some of the omissions and acts charged as wrongful are charged as having occurred and been done since appellee became the owner of the land. If a complaint shows a good cause of action as to any part of the demand, it is good on demurrer. *Howe v. Dibble*, 45 Ind. 120.

The record sufficiently shows, affirmatively, that the verdict does not rest upon the second paragraph of the complaint. The instructions of the court practically withdrew from the consideration of the jury all matters set up in that paragraph. Whether it was good or bad, therefore, can be of no consequence, as appellant was in no way affected by it. *Bronnenburg v. Coburn*, 110 Ind. 169. So far as we have been able to discover, there was no attempt to prove any of the averments of that paragraph, as a ground of recovery.

Upon the whole case, our judgment is, that the record presents no error for which the judgment should be reversed.

Judgment affirmed, with costs.

CARLSON

v.

OCEANIC STEAM NAVIGATION CO.

(New York Court of Appeals, April 24, 1888.)

Passengers' Baggage — Loss — Evidence of Value. — In an action by an emigrant against a steamship company to recover damages for lost baggage, a custom-house inspector cannot competently testify as to the value of personal baggage which emigrants of the same class usually carry. Earl, Peckham, and Gray, JJ., dissenting.

Same — Jewelry — Notice to Carrier — Federal Statute. — Under U. S. Rev. Stat. sect. 4281, which prohibits the shipment of jewelry, gold, silver, etc., without notice by the shipper of the character thereof, and entry thereof upon the bill of lading, an emigrant simply carrying as a part of her ordinary baggage such small articles of jewelry and silverware as are only a legitimate part thereof, is not a shipper of such articles within the meaning of the law.

APPEAL from general term of the Supreme Court, Fifth Department.

Action by Hilma Carlson against the Oceanic Steam Navigation Company, to recover damages for the loss of the plaintiff's baggage during her voyage from Europe to America. Judgment for plaintiff, from which defendant appeals.

Wheeler, Cortis, & Godkin (Everett P. Wheeler and Lawrence Godkin of counsel) for appellant.

J. Edward Swanstrom for respondent.

PER CURIAM.—There are but two questions presented for review in this court, — one arising upon an exception taken by defendant to the exclusion of certain evidence offered by it, and the other upon an exception taken by it to a refusal of the court to charge the jury as requested. A majority of the court think that neither objection is tenable.

The defendant called as a witness an inspector of customs at the port of New York, who testified that he had been such for ten years, and had been specially detailed to examine the baggage of emigrants from Sweden and Norway upon their arrival in port, and had examined such baggage on hundreds of occasions, for the purpose of ascertaining whether there were dutiable goods therein. He said he could give a fair idea of the value of the ordinary baggage of those emigrants. He was then asked to

Evidence of value of baggage.
Testimony of Inspector.

state what, in all his experience, was the utmost value of the baggage that he had ever seen in any one trunk from those countries in the custody of any one emigrant. This question was objected to as immaterial and incompetent, and the objection was sustained, and an exception taken by defendant. The evidence was claimed to be competent, on the part of the defendant, upon the issue as to what was the value of the baggage ordinarily or usually taken by passengers of like station as plaintiff, and pursuing a like journey. The case of *Railroad Co. v. Fraloff*, 100 U. S. 24, was cited as an authority for such evidence. It is thought that it does not bear out such contention. The question in that case was whether such an amount and value of lace as was carried by the passenger in her lost trunk could, under any circumstances, be called or come within the fair meaning of the term "baggage." The court held that it was a question of fact for a jury, under proper instructions, to decide; and as there was evidence that the passenger habitually wore such lace on ball and theatre and other dresses, and that it was necessary for a person in her station to carry it when travelling, the verdict in favor of the passenger would not be set aside. But in this case the contents of the trunk, as sworn to by the plaintiff, were such as, under any circumstances, would fairly be called baggage; and whether it was more or less than emigrants usually travelled with was not important, as in any event it could not be said to be more than any one would have a right to travel with, and to hold a carrier responsible for the loss of. We have examined the other cases cited by counsel for defendant arising in this State, and some of them reported in this court; but we do not think they sustain or point to any rule which would make the proposed evidence admissible.

As to the other question arising upon the section (4281) of the United States Revised Statutes which prohibits any shipper of (among other things) jewelry, trinkets, gold, or silver, manufactured or unmanufactured, from lading such articles as freight or baggage, without giving notice to the master of the character and value thereof, and having the same entered on the bill of lading, we do not think the plaintiff comes within the purview of the statute, as she is not a shipper of any such articles within the meaning of the law. She was simply carrying a part of her ordinary baggage, — such small articles of jewelry and silverware as, under any circumstances, would only be regarded as a proper and legitimate part thereof. There is also some question whether the law is applicable to the plaintiff, a foreigner, who made the contract of carriage with a foreign corporation outside the jurisdiction of this country, even though action is brought in this country and upon

Jewelry in baggage. Notice to carrier.

such contract. But, for the reason already given, the statute does not apply. The judgment must therefore be affirmed, with costs.

All concur, except Earl, Peckham, and Gray, JJ., who dissent on first ground.

Passenger may place Money in Trunk without communicating Fact to Carrier. — *Missouri Pac. R. Co. v. York*, 18 Am. & Eng. R. R. Cas. 623.

PULLMAN PALACE CAR CO.

v.

POLLOCK.

(*Texas Supreme Court.*)

Passengers' Baggage — Sleeping-Car — Liability of Car Company. — While a sleeping-car company does not assume towards personal baggage taken into a car by a passenger the duties and liabilities which the common law imposes upon common carriers as to ordinary freight, or upon an inn-keeper as to guests, it is responsible in the same way as any common carrier for a failure to perform the duties which devolve upon a common carrier in relation to baggage of a passenger which is not given into its exclusive custody; and if, through a failure of the company to exercise reasonable care, the passenger's baggage is stolen, the company is liable therefor, even though the train to which the car is attached belongs to another company.

APPEAL from District Court, Marion County.

Burry, Scott, & Jones and Todd & Rowell for appellant.

C. A. Culberson for appellee.

STAYTON, J. — This action was brought by the appellee to recover the value of a valise and its contents, consisting of such articles as persons travelling need and usually carry with them. The cause was tried without a jury, and a judgment was rendered in favor of the plaintiff. The facts are undisputed, and are, in substance, as follows: At Marshall the appellee engaged and paid for a berth in the sleeping-car of the appellant, attached to a train on the Texas & Pacific Railway, his destination being Dallas. He entered the sleeper, carrying his valise, which he placed on the floor of the smoking-room. When the train arrived at Terrell, about night, it was ascertained that a wreck between that place and Dallas would cause some delay, and the train backed down to the depot and stopped. Pollock then went to the telegraph-office to ascertain how long

Facts.

the train would be delayed, leaving the porter and conductor of the Pullman car in the sleeper. After remaining at the telegraph-office a short time, he returned, and, on entering the car, found that his valise was missing, and that the porter was not in the car. He, however, found the conductor in the rear end of the sleeper, to whom he made known his loss; whereupon the conductor informed him that he was then on his first trip as conductor, and not familiar with the details of his duties. The loss occurred on the 27th of October, 1886, and the train reached Terrell about six or seven o'clock P.M. The doors of the sleeper were open when appellee returned to it after going to the telegraph-office. The evidence tends to show that the porter knew that the appellee deposited his valise on the floor of the smoking-room of the sleeper.

The conclusions of the law and fact found by the judge who tried the cause seem not to have been asked, or, at least, are not found in the transcript. There is no evidence tending to show the true relations between the railway company and the appellant, or tending to show the true relations of the appellant to persons who, after having acquired the right to be transported and to occupy a berth in its sleeper, entered it with their baggage, further than as this may appear from the statement already made. Enough, however, appears, to show that the appellant assumed to the appellee the duties of a carrier; and while it is evidently true that it did not assume the duties and liabilities which the common law imposes upon common carriers as to ordinary freight, or the liabilities which the innkeeper assumes to guests, yet we see no reason why it should not be held responsible, just as any common carrier would be held responsible, for a failure to perform the duties which devolve upon the common carrier in relation to the baggage of a passenger which is not given into the carrier's exclusive custody.

The true rule in this class of cases we believe to be that asserted by the Supreme Court of Massachusetts in the case of *Lewis v. Sleeping-Car Co.*, 28 Am. & Eng. R. R. Cas. 150. In that case it is said, "that, while it is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor. Such a rule is required by public policy and by the true intent of both the passenger and the company, and the decided weight of authority supports it. *Sleeping-Car Co. v. Diehl*, 84 Ind. 474; *Palace Car Co. v. Gardner*, 3 Penny. 78; *Palace Car Co. v. Gaylord*, 23 Amer. Law Reg. 788."

Liability
of sleeping-car
company for
baggage.

The facts that a railway company to whose train a sleeping-car may be attached may not own such car or control its internal management, and that the same may be under the control of a company who does own and operate such car, and that the main compensation for transportation may be paid to the company to whose train the sleeper is attached, do not deprive the company so owning and operating a sleeping-car of the character of a passenger carrier; for the contract of such a company is not only that the passenger may sit and sleep in the car during the journey for which he contracts, but it goes farther, and binds the owner of such car to transport the passenger in it or some like carriage to his place of destination, the passenger having paid the fare demanded by both companies. If passengers by railway train retain the exclusive custody of their baggage, then the carrier is not responsible for its loss, unless this results from the carrier's negligence; and the failure of a passenger to use reasonable care in reference to it will defeat his right to recover. In the case before us, the court below, in the absence of conclusions of fact and law showing to the contrary, must be presumed to have decided this case in accordance with the rules we have announced. This involved a finding of fact that the valise was lost by reason of the failure of appellant to use such care as the law requires, and without failure on the part of the appellee to use that care required of him.

Under the evidence we are not prepared to hold that such a finding of fact was not authorized, and the judgment must be affirmed. It is so ordered.

Liability of Sleeping-Car Company for Loss of Passengers' Baggage. — See *Lewis v. New York Sleeping-Car Co.*, 28 Am. & Eng. R. R. Cas. 148; *Dargan v. Pullman P. Car Co.*, and note, 26 Ib. 149-153.

KANSAS CITY, ST. JOSEPH, & COUNCIL BLUFFS R. Co.

v.

RUDEBAUGH.

(Kansas Supreme Court.)

Passengers' Baggage — Limiting Liability — Stipulation on Ticket. — A limitation inserted in a railroad ticket, limiting the liability of the company to \$100 in case of loss of baggage checked by virtue of the purchase of said ticket, is not binding on the purchaser of the ticket, unless, with a knowledge of such limitation, he agrees to it.

ERROR to District Court, Atchison County.

Action by the defendant in error, before a justice of the peace in Atchison County, to recover the value of a trunk and its contents. Trial, and judgment for the plaintiff. Defendant appealed to the District Court of Atchison County. Trial by the court, and judgment thereon in favor of the plaintiff, defendant in error, for \$211.25 and costs. Defendant brings error.

The opinion states the facts.

E. S. Gosney and Jackson & Royse for plaintiff in error.

Tomlinson & Eaton for defendant in error.

CLOGSTON, C. — This action was brought to recover the value of a trunk and its contents, which plaintiff in error received as baggage to be transported over its road and connecting lines to Mitchell, Dakota Territory. The findings of fact by the court show the following: That on the twenty-eighth day of August, 1884, plaintiff, defendant in error, desiring to go from Atchison to Mitchell, Dakota Territory, applied to the defendant at Atchison for a ticket from Atchison to Mitchell, and was by the agent informed of the price of a ticket or fare between said points, which amount the plaintiff paid, and was given a ticket. The ticket received by the plaintiff was what is called a "skeleton ticket," with coupons attached, giving the names of the different roads over which plaintiff would travel in going from said Atchison to said Mitchell. At the time of receiving said ticket the agent made no statement of the contents of the ticket to the plaintiff, and she made no examination of the ticket. The heading of the ticket contained these words: "Special limited ticket. Good for one continuous first-class passage, when (—) stamped by the company's agent, subject to the following contract: In selling this ticket for passage over other roads, this company acts only as agent, and assumes no responsibility beyond its own line. None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100." Below this printed matter was left a blank space for the signature of the purchaser, and also for a witness. Plaintiff was not required to and did not sign said ticket, and it was not witnessed or signed by any one. No reduction of fare was made by reason of the stipulation contained in the ticket. This ticket was for a passage, first, over the defendant's road from Atchison to Council Bluffs; from Council Bluffs, over the Chicago & North-western Railway and the Sioux City & Pacific Railroad, to Sioux City; from Sioux City, over the Chicago, Milwaukee, St. Paul Railway, to Mitchell, Dakota. After receiving this ticket, the plaintiff presented it to the baggage agent at the union

depot at Atchison, and with it her trunk, containing the usual wearing apparel of the plaintiff, and requested that the same be checked, which was done, and she received a check for the transportation of said trunk from Atchison to Mitchell over the lines named in said ticket. Plaintiff boarded the defendant's train at Atchison, and defendant took charge of and placed said baggage upon the train, and the same was transported to Council Bluffs. When it arrived there, the trunk was, by the defendant's agent in charge of the train, assisted by the employees of the union depot at Council Bluffs, unloaded from the baggage-car, and placed upon a truck for the purpose of being transported into the depot. The defendant had also received as baggage, somewhere between Atchison and Council Bluffs, a box containing three jugs of sulphuric acid. The top of this box was covered with a cloth only. In unloading the baggage, this box was placed on the top of the truck containing the trunk of the plaintiff, and in this condition the truck was rolled into the baggage-room of the union depot by the employees of said depot; and, in removing the baggage from the truck, they first attempted to remove the box containing the sulphuric acid, and the contents of one of the jugs was spilled, and run over the baggage and the trunk of the plaintiff, the acid escaping by reason of the cork having been eaten up or destroyed by the acid, and the trunk and its contents were saturated by the acid, and all of its contents destroyed and burned up, save and except two or three articles. Plaintiff, on arriving at her destination, presented her check, and was informed that her trunk had not arrived; whereupon she went to a hotel and remained nine days, at an expense of \$11.25, waiting for her trunk to arrive. Finding that it did not come, she returned to Council Bluffs, and there learned of the destruction of the baggage, and the articles saved therefrom were turned over to her. Afterwards she returned to Atchison, and commenced this action for the value of the trunk and its contents.

The first objection to this judgment is, that the court had no jurisdiction of the defendant; contending that, as this action was brought under sect. 50, Code Civil Proc., it (the defendant) did not come within the provisions of said section, under the facts shown in this case. The evidence shows, and the court found, that the defendant run its train over its main line in Missouri, and at Atchison crossed the bridge owned by the bridge company to the union depot over the tracks owned by the Union Depot Company, which company was composed of seven railroad companies, among which was the defendant. Defendant backed its train over the bridge to the union depot, where it received baggage and passengers for transportation over its line. No evidence was shown

Objection to
jurisdiction.
Waiver.

that there was any lease by which the defendant run its trains over the bridge, and to the depot at Atchison. Under this evidence, the defendant insists that it cannot be sued in the county of Atchison, for the reason that it does not lease, own, or control any line of road in the city of Atchison. The record shows that this action was brought in Justice's Court, and appealed by defendant to the District Court, where the case was tried upon the bill of particulars as filed in the Justice's Court. Nowhere does the record disclose any objections to the jurisdiction of the court, either before the justice of the peace or the District Court; and the first objection made to the jurisdiction of the court was made in the motion for a new trial. This seems to us to be too late to raise that question. If the defendant desired to challenge the jurisdiction of the court, it ought to have done so at an earlier period in the history of this case. *Miller v. Bogart*, 19 Kan. 117; *Railroad Co. v. Akers*, 4 Kan. 453; *Shuster v. Finn*, 19 Kan. 114.

The second reason assigned why this judgment should be reversed or modified is, that the ticket issued by the defendant, and under which this baggage was checked, was a contract limiting the liability of the defendant, in case of loss of baggage, to \$100. It is perhaps true that the defendant might, by a special contract, limit its liability so as not to be responsible in case of loss of baggage beyond a given sum, provided the contract was a reasonable restriction. In this case there was no contract on the part of the plaintiff, and no knowledge was conveyed to her of any intention on the part of the defendant to limit its liability, save and except what the ticket itself contained; and this was not read, or its contents made known, to the plaintiff. Can this be called or implied a contract? We think that, before the plaintiff can be bound by the declarations in the ticket for transportation on a passenger-train, the restrictions or limitations sought to be made must be known to her, and she must have accepted the ticket with a full knowledge of the restrictions contained therein. This ticket contained a blank for the signature of the purchaser, and that signature was to be witnessed by some one. This was not done in this case. The object of that blank space being left there was, doubtless, that the attention of a purchaser might be called to the conditions of the ticket, and, when called to sign it, he would then know its contents. This would constitute a contract between them, but without it there would be no contract, and no restriction or limitation of the liability of the company. The ticket is not a contract of itself; it is simply evidence of a contract. *Lawson*, Cont. sects. 106, 107. Before the giving of this ticket there was nothing said between

Validity of contract limiting liability.

the parties that one was to limit his liability under certain conditions or circumstances, and consequently the ticket could not be evidence of a contract that did not exist. Again, where a person purchases a ticket, he does not expect that thereby he is making a contract limiting the liability of the railroad company, but simply that he is receiving a check showing that the fare has been paid over the line to the place of destination, wherever that may be. *Railroad Co. v. Campbell*, 36 Ohio St. 657; s. c., 3 Am. & Eng. R. R. Cas. 246; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Railroad Co. v. Roach*, 35 Kan. 740; s. c., 27 Am. & Eng. R. R. Cas. 257, and cases there cited.

But defendant insists that this baggage was not destroyed or injured while in its possession or under its control, but after it had been transferred to the employees of the union depot at Council Bluffs. True, the baggage was in the union depot when it was destroyed; but it was there in the same condition that it was left or placed in by the agents of the defendant. Its employees had placed it upon the truck; and after it was placed there, with other baggage, nothing was done to it by the employees of the Union Depot Company to cause its destruction; but it was destroyed by reason of improper baggage having been placed on top of the trunks, the contents of which when placed in the depot were spilled over the baggage, thus destroying it. Then, it was the act and negligence of the defendant that caused the injury. It had received a box not in condition to be taken as baggage, containing a jug of acid, which was liable to be broken, and its contents spilled over the baggage, and had carelessly and negligently placed such box on the trunk of the plaintiff. Without passing upon the question as to the liability of the defendant, had the baggage been transferred to a connecting line, and then by the negligence of the employees of said connecting line the baggage had been lost, we hold that the defendant, by its negligence and carelessness, caused the destruction of this baggage, and is liable therefor.

Defendant's
negligence
caused destruction of baggage.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. — It is so ordered; all the justices concurring.

Limiting Liability for Baggage. — See *Mauritz v. New York, etc., R. Co.*, 21 Am. & Eng. R. R. Cas. 286, note 292; *Baltimore & O. R. Co. v. Campbell*, 3 Ib. 246.

GREAT WESTERN R. Co.

v.

BUNCH.

(House of Lords, Law Reports, 13 App. Cas. 31.)

Passengers' Baggage — Delivery to Porter — Liability of Company. — An intending passenger arrived at a railway station at 4.20 P.M. on Christmas Eve, with a travelling-bag and two other articles of baggage, in order to travel by the 5 P.M. train. A porter labelled the two articles, and took all the articles to the platform, the train not then being at the platform. The passenger told the porter she wished the bag to be put into a carriage with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe, and that he would take care of the baggage and put it into the train. She then went to meet her husband and get her ticket. Ten minutes after she had left the baggage, she and her husband returned together to the platform, and found that the two labelled articles had been put into the baggage-car of the train, but that the porter and the bag had disappeared. In an action against the railway company for the loss, *held*, that there was evidence upon which the trial court might reasonably find that the bag was in the custody of the railway company for the purposes of present and not of future transit from the time when it was delivered to its porter until its disappearance, and that its loss was due to their negligence.

Same — Liability of Company — Common Carriers. — A railway company accepting passengers' baggage, to be carried in a carriage with the passenger, enter into a contract as a common carrier, subject to the modification, that, in respect of his interference with their exclusive control of his baggage, the company is not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. *Disapproving Bergheim v. Great Eastern Railway Company* (3 C. P. D. 221).

Lord Bramwell dissents.

APPEAL from decision of the Court of Appeal (17 Q. B. D. 215).

In an action brought by the respondents against the appellants in the Marylebone County Court to recover damages for the loss of a bag and its contents, the following evidence was given: —

On the 24th of December, 1884, the respondent, Mrs. Bunch, arrived at the Great Western Railway Station, Paddington, at 4.20 P.M., with a portmanteau and hamper, and also a Gladstone bag belonging to her husband, the other respondent, for the purpose of travelling to Bath by the 5 P.M. train. A porter came forward, and put all the luggage on a trolley, labelled the portmanteau and hamper, and wheeled the trolley on to the platform. Mrs. Bunch told the porter that she wished the bag to be put into a carriage with her, and asked him if it would be safe to leave it with him. The porter replied that it would be quite safe,

and that he would take care of the luggage and put it into the train. Mrs. Bunch then left the porter standing by the luggage on the platform, and went to the front of the station to meet her husband and get her ticket, and found that he had just arrived from the Moorgate street station, where he had taken a through ticket for himself to Bath, and that on his arrival at the Paddington station he had also taken there a ticket for her to Bath. Ten minutes after Mrs. Bunch had left her luggage with the porter on the trolley, she and her husband returned together to the place where she had left the trolley, and found that it had been taken away, and that the portmanteau and hamper had been put into the van, but that neither the bag nor the porter were forthcoming. There was a great crowd, it being Christmas eve.

Similar tickets to those taken by the plaintiffs were put in, and purported to be "issued subject to the conditions stated on the company's time bills;" and a copy of the "time bills" was also put in, containing certain "general notices and regulations," which it was contended were the "conditions" referred to by the tickets; and likewise a copy of a printed notice, in large characters, which was affixed in the labelling vestibule. Amongst the general notices and regulations contained in the time bills were the following:

"LUGGAGE—The company will not in any case be liable for luggage taken with the passengers into the carriages, but only when it is properly labelled and placed in a luggage van. The company will not be responsible for luggage not labelled, or improperly labelled."

The material parts of the notice affixed in the labelling vestibule were as follows:

"Passengers are required to see their luggage duly labelled, as until so labelled it will not be put into the trains, nor will the company assume or incur any responsibility whatever in respect thereof."

"The company's servants have strict orders not to take charge of any luggage or parcels, and if passengers are desirous of leaving them under the charge of the company they must themselves take or see them taken to and deposited in the cloak-room."

The county court judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the porter was guilty of great negligence in not being in readiness to put the bag into the carriage with Mrs. Bunch on her return, as promised; and he gave judgment for the plaintiff, Mr. Bunch, for £18, and non-suited the female plaintiff.

The defendants having obtained a rule in the Queen's

Bench Division calling on the plaintiffs to show cause why judgment should not be entered for the defendants or a new trial had, Day and A. L. Smith, JJ., differed, Day, J., giving judgment for the defendants, and A. L. Smith, J. (who was of opinion that the defendants were liable) withdrawing his judgment. The rule was accordingly made absolute to enter judgment for the defendants.

The court of appeal (Lord Esher, M.R. and Lindley, L.J., Lopes, L.J., dissenting) reversed the decision of the Queen's Bench Division and restored the judgment in favor of the plaintiff, Mr. Bunch. 17 Q. B. D. 215. Against this decision the defendants now appealed.

During the argument in this house it was agreed between the learned counsel that it was to be taken as a fact that the train was not at the platform when Mrs. Bunch arrived there with the porter and the luggage.

Sir *H. James*, Q.C., and *R. S. Wright* for appellants.

C. C. Scott for respondents.

LORD HALSBURY, L.C.—My lords, the form in which this question arises for your lordships' decision is one which precludes any consideration of the propriety or impropriety of the decision of the learned county court judge as to any question of fact as to which there was legal evidence before him. I must observe that both the learned judges in the divisional court appear to me to have treated questions so conclusively found, as nevertheless open to review. It is, perhaps, not surprising that when questions arise upon what either are, or are assumed to be, matters of daily experience, even a judge is tempted to import his own knowledge, and so give a color to facts which he ought to treat as finally and conclusively decided by the tribunal to whom they have been remitted.

Now, in this case the facts have not been specifically found; but the learned judge has found a verdict for the plaintiff, and has stated that finding together with the evidence. If therefore it is possible to find a verdict for the plaintiff upon that evidence, the plaintiff is entitled to maintain his verdict. It seems to me that the two contentions which have been in debate before your lordships would resolve themselves into a question of fact, upon which there might be a difference of opinion if the facts were here open to review. Your lordships, in the first place, have to ascertain, not from any written instrument, nor from any express words of contract, what were the contract relations between the plaintiffs and the defendants. I confess I should have been better satisfied if some evidence directed to what was the practice of the

particular railway company had been before us; but in this, as in other parts of the case, I must content myself with saying, that if there was enough to enable the learned judge to infer what was the practice, and from thence to infer what was the contract, I am not at liberty to review his decision.

There are, of course, some facts which both sides have assumed to be proved, and with respect to which it would be mere pedantry to suggest that they were not formally proved. That the defendants, for instance, were a railway company carrying on the business of common carriers for hire; that the premises upon which the plaintiffs' luggage was deposited were premises belonging to and in the exclusive control of the defendant company; that the arrangement of the trains, the bringing of them to the platform, the arrangements by which the luggage, whether hand-luggage or van-luggage, was to be distributed, were all under the superintendence and direction of the defendant company, are matters as to which no formal evidence is to be found in the report of the county court judge, but are also matters as to which no one has or can suggest any real doubt. I do not think that any of your lordships entertain any doubt that if the plaintiffs' luggage were entrusted to the porter for deposit and custody as distinguished from the physical handing over for the purpose of transit, the defendants would not be liable. The question really in debate is somewhat obscured by the existence of the cloak-room system; and that system, I think, is expressly guarded by the company not permitting any of their servants undertaking the guardianship of any property whatsoever, except under the circumstances and upon the conditions which the company prescribe; but I think the same question would arise and should be decided upon precisely the same principles if the company had no cloak-room system, and gave no authority to their servants to receive luggage at all, except as incidentally to their contract of carriage.

It is worthy of remark that Day, J., and Lopes, L.J., upon an assumed state of facts at which I think the county court judge was at liberty to arrive, lay down the law very much as I should agree it ought to be laid down. Day, J., says: "If a passenger requires him (the porter) to delay a reasonable time, while, for instance, the passenger takes a ticket, he (the porter) is responsible during all reasonable time that should elapse between the arrival at the station and the arrival on the platform of the passenger, taking the ticket being allowed for and the little journey to the platform; during all that time he is the agent

Facts assumed
to be proved.

The cloak-
room system.

Law laid down
by Day and
Lopes, JJ.

of the company as bailees of the luggage which is intrusted to him; he is acting in the ordinary discharge of his duty;" and Lopes, L.J., says: "I do not think it is part of the employment of an ordinary porter to take charge of luggage beyond the time usually or reasonably, I should say reasonably, necessary for this transit," the words of the lord justice "this transit" referring to the transit of the goods from the cab or outside of the station.

The admissions of counsel have rendered it unnecessary to rely upon mere inference in this case, as to the question of whether the train had been drawn up to the platform or not; and we must now accept it as a fact that neither the van nor the carriages for the passengers were in a position to enable the hand-luggage or the van-luggage to be placed where they were intended to be deposited for the purposes of the journey.

My lords, if I were myself to be drawing inferences as to the reasonableness in point of time of the period of the plaintiff's arrival before the departure of the train by which she intended to travel, I am not certain how I should decide that question; on the one hand, forty minutes seem a long time before the departure of the train, and to call upon the servants of the company to take charge of luggage for the purpose of the journey; on the other hand, the fact that it was Christmas eve; that the railway company were, within a very short time of the arrival of the plaintiff, issuing tickets for that journey; and that the porters were receiving without objection or demur van-luggage, with respect to which it is not denied that they were, in so doing, acting in pursuance of the authority conferred on them by their employers, are all circumstances from which, I think, it might be inferred that the time was not too long; but, in truth, my lords, I am not entitled to speculate upon the matter; this is essentially a question of fact, and the learned judge has, in this instance, specifically found that the time of the entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. It seems difficult to say that, with the evidence before him to which I have adverted, it was not open to him to arrive at that conclusion.

Now, my lords, while I entirely agree that the duty of the porter, as disclosed by the evidence, is either to take the luggage to the cloak-room if entrusted to him for the purposes of deposit, or to the train if for the purposes of the journey, I am at a loss to understand how the circumstance that the train is not at the platform can affect the liability of the company. Assume

Train not
drawn up.

Reasonable-
ness of time of
arrival before
departure of
train.

Effect of fact
that train was
not at plat-
form.

that the company are receiving luggage for the purposes of the journey, and that they do so receive luggage for the purposes of the journey, the presence or absence of the train at the platform is a matter within the control of the company, and not of the passenger, and I cannot understand what evidence there is in this case from which it could be reasonably inferred that the porter would be acting within the scope of his authority in receiving the plaintiff's luggage if the train were at the platform, and beyond it if the train had not come up. Doubtless a company might make a regulation if they thought fit: "We will not receive luggage for a train forty minutes before it starts;" they might say, "We will not receive luggage to be put on a train which has not yet arrived at the platform." I should very much doubt whether any railway company has any uniform practice as to the period of time which they allow to elapse between the arrival of the train at the platform and its departure. It is enough, however, to say, that in this case no evidence of any such practice was given.

If a possible inference to be derived from the facts as proved, is, that what the porter did in this case was the ordinary practice of the company, then I should say it would follow that the mode in which the company carried on its business was, to accept the passengers' luggage at the entrance to the station, and to take it to its intended destination, whether van or passenger carriage, at the option of the passenger, and that during the period of what Lopes, L.J., describes as "this short transit" it would be in the custody of the company for the purposes of, and as part of, the journey. If the train were at the platform, it would, I suppose, in ordinary course, be distributed, some to the van and some to the passenger carriage, as directed; but, once the porter has received and accepted it as luggage to be received and forwarded by the train about to start, it seems to me impossible to contend, and I do not understand Lopes, L.J., or Day, J., to contend, that it is not in the custody of the company for the purposes of the journey. If the porter refused to take charge of the luggage, the company might be liable for refusing to carry according to their professed mode of carriage, but might not be liable for loss of goods which they refused to carry; but whether the porter would be doing his duty in refusing to take charge of the luggage during the short transit, or acting in pursuance of his masters' orders, is the very question in debate. If one assumes that it was contrary to his duty, of course the company would not be liable; if it was his duty, the company would be liable.

But why am I to assume, upon the facts here put in proof,

that the porter was acting contrary to his duty, and, in hopes of personal gain to himself, undertaking a course of business not imposed upon him by the orders of the railway company? I confess, for myself, I should draw the same inference that was drawn by the county court judge; but what the defendants, in order to succeed, must establish, is, that the county court judge could not by law have drawn such an inference. It is suggested that Mrs. Bunch's phrase, in asking the porter whether her bag would be safe, exhibited a consciousness that she was asking a favor, and not insisting on her rights as a passenger. I admit that the word "it," grammatically, as the evidence is reported to us, appears to refer to the bag, but I think what Mrs. Bunch meant was the luggage, both van- and hand-luggage, upon the trolley. But, whatever Mrs. Bunch meant, I think she might have asked with equal force whether the train would arrive safely at its destination; and I do not think either her question or the porter's reply would have affected the contract relations of the parties. The truth is, that in the conduct of business more contracts are made by the understood course of business than are ever reduced into writing, or even into spoken words at all; and I think that, when people hold themselves out as carriers, and receive luggage at a place regularly appointed to receive luggage for the purposes of a journey, they must be understood to receive it as carriers unless they give notice to the persons from whom they receive it that they receive it in some other capacity. It may be said that I ought not to disregard the existence of the cloak-room system, and that the receipt by the company's servants is susceptible of two interpretations. I admit that this is so; but in this case Mrs. Bunch at once informed the porter that the portmanteau and the hamper, as well as the Gladstone bag, were to be put into the train; and I agree with Lindley, L.J., that the company's notices and directions to their servants are intended to apply, and upon their true construction do apply, to luggage received for purposes of deposit, and not for purposes of transit, and it is upon this part of the case that I think the finding of the learned judge is conclusive against the defendants when he finds that the time of entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. Once that proposition is accepted as conclusively found, it seems to me that the law that would be laid down by the minority of the court of appeal would amount to this: that a passenger bringing his luggage for carriage, a reasonable and proper time before the departure of the train by which the luggage is to be carried, can enforce

Whether porter was acting in accordance with his duty.

Cloak-room system—Company's notices and directions to servants.

no liability upon the company in respect of his luggage except it is placed in the cloak-room as a preliminary to the transit, and a receipt given for the same. And even this inadequately represents the difficulty of the contention, since it is obvious, from the notices put in evidence, that the cloak-room tickets and receipts import that the passenger who has deposited his luggage in the cloak-room is expected to get it out again from that same cloak room, and if he wishes to travel must again commit it to the custody of the company after he has so taken it out. It would seem, therefore, to involve this proposition, that for parcels carried in the passenger carriages the railway company never can be liable at all.

I do not know that it is absolutely necessary in this case to determine what is the exact contract between the company and the passengers, since the learned judge has found negligence against the company, and I do not understand that there is any difference of opinion among us, that if there was any contract to take care of the bag there is sufficient evidence of negligence. But I must express my opinion that the views expressed by Lord Truro, Jervis C.J., Williams J., Crowder J., Willes J., Keating J., and Montague Smith J. do not appear to have had sufficient weight given to them—see *Richards v. London, Brighton and South Coast R. Co.*, 7 C. B. 839; *Talley v. Great Western R. Co.*, Law Rep. 6 C. P. 44; *Butcher v. London and South Western R. Co.*, 16 C. B. 13—by the judgment in the court of appeal in *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221. All these learned judges appear to me to adopt the view that a railway company in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default.

In *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221, the court of appeal, commenting upon the case of *Talley v. Great Western R. Co.*, Law Rep. 6 C. P. 44, do not, I think, quite accurately represent the judgment of the court of common pleas. In *Talley v. Great Western R. Co.*, Law Rep. 6 C. P. 44, that judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care, the fact being that the loss was caused by his neglect to do so, and would not have happened without such

Contract between company and passengers as to baggage.

Authorities examined.

negligence. The negligence in question was leaving his portmanteau in a carriage unprotected by his presence; it was found at the end of a journey cut open and its contents rifled in a carriage which he had originally travelled in as far as Swindon, but which he had negligently omitted to re-enter upon leaving the refreshment-room at that station. It is obvious that if the court were right that the general liability of the company was modified by the undertaking of the passenger to look after his own luggage while it was in the passenger carriage, he had omitted that duty. But suppose the loss had happened by reason of some circumstance which would have been no breach of that modifying stipulation, could it

Contract in receiving hand baggage. have been contended that the company were not responsible as common carriers because they were carrying for hire in one part of the train and not

in another? If the view thus assumed is the correct view of the law, and I think it is, the moment the porters received Mrs. Bunch's luggage, whether van- or hand-luggage, they received, for carriage to Bath, all the luggage of the passenger; they received the van-luggage to be put into the van; they received the hand-luggage to be put into the passenger carriage; and I think the learned judge was entitled to infer that their practice, and therefore their contract, in receiving hand luggage, was to put it into the passenger carriage, or if the railway company did not then bring up the train to the platform, to take care of it until the carriage was drawn up and in a position to receive the hand-luggage, which, in my view, the porter, as the agent of the railway company, had accepted and received for that purpose.

For these reasons, I am of opinion that the judgment of the court of appeal was right, and I move your lordships that that judgment be affirmed, and that this appeal be dismissed with costs.

LORD WATSON.—My lords, this appeal brings up for consideration the decision of a county court judge, which the higher courts and this house have no jurisdiction to review, except in so far as it involves principles of law. **Case stated.** It is impeached upon this ground, mainly, that there was no evidence before the learned judge from which it could be reasonably inferred that, at the time when it disappeared, the respondent's Gladstone bag had been delivered to, and was in the possession of, the appellant company for the purpose of carriage. The evidence it is said, points to, and only warrants, the conclusion that the bag was in the custody of a railway porter as bailee for the respondents.

In *Butcher v. London and South Western R. Co.*, 16 C. B.

22, Jervis C.J. observed, in reference to luggage which had been conveyed in the same carriage with its owner, "that, though not in express terms engrafted into it, it is Obligation of company when porters take charge of passengers' luggage. a part of the contract of a railway company with its passengers, that their luggage shall be delivered at the end of the journey, by the porters or servants of the company, into the carriages or other means of conveyance of the passengers from the station." What was thus said of the termination applies equally to the commencement of a railway journey. In the ordinary course of business a passenger's luggage is received at the entrance to the station by the servants of the company, and is by them conveyed either to the van or to the carriage in which he intends to travel. I do not mean to say that railway companies are under any statutory or other obligation to provide that accommodation; but they find it for their interest to do so; and, in taking charge of luggage for these purposes, their servants act within the scope of their implied authority. Their duty is, according to prevailing usage, limited to the transport of passengers' luggage from the vehicle which brings it to the station to a train which is about to start, and does not extend to their taking charge of luggage which cannot, in any reasonable sense, be considered as in actual course of transit. It may be that railway porters do sometimes undertake the charge of luggage which is merely intended for future transit; when they do so, they exceed the limits of their implied authority, and, in that case, their possession cannot be regarded as the possession of their employers.

If the respondents had gone to Paddington station at noon of the 24th of December 1884, and had then left their Gladstone bag with a porter in order that it might accompany them on their journey to Bath by the 5 P.M. train, I should have had no hesitation in Time between arrival at station and departure of train. holding that the appellant company had not become responsible for its safe custody during the interval. In that case, it would have been in accordance with well-known practice, and therefore an implied term of the subsequent contract between the parties, that the company were not to be liable, unless the luggage was duly deposited in the office provided for that purpose. On the other hand, if the respondents had arrived at the station at 4.55 P.M., I entertain as little doubt that the delivery of their Gladstone bag to a porter, for the purpose of its being conveyed to the carriage in which they were about to travel, would have made the possession of their porter that of the appellant company.

Whether passengers' luggage, delivered to a railway porter,

is in his possession for present, or merely with a view to future transit, is necessarily a question of degree, depending upon the circumstances of the case. Railway companies, as a matter of fact, frequently provide for the travelling public, not only booking offices, but refreshment rooms, and other conveniences; and passengers who merely avail themselves of such accommodation as incidental to their use of the railway, cannot be held to have temporarily ceased to prosecute their journey. It is impossible to fix any precise limit of time prior to the starting of a particular train, within which the company are to be liable for passengers' luggage delivered to their servants for conveyance by it, and beyond which they are not to be liable. In my opinion the company are responsible for luggage delivered to, and in the custody of, their servants, for the purpose of transit, whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail, and is not merely waiting in order to begin its prosecution at some future time.

In the present case, the evidence shows that the female respondent arrived at Paddington station forty minutes before the train by which she and her husband travelled was timed to start. She gave her luggage into the charge of one of the appellant company's porters, saw part of it labelled, and directed the porter to place the Gladstone bag, which was not labelled, in the same compartment with herself. The respondent then left the platform, and went to the booking office, for the purpose apparently, either of taking her ticket, or of seeing that her husband procured it for her. She there met her husband, who had taken a ticket, and on their return to the platform, about ten minutes after her arrival, they found that the labelled luggage had been placed in the van, and that the porter and the Gladstone bag had both disappeared. In these circumstances, I think the county court judge might reasonably come to the conclusion that the bag continued to be in the custody and possession of the appellants for the purposes of present and not of future transit from the time when it was delivered to their porter until its disappearance.

In the argument for the appellants considerable stress was laid upon the fact that at the time when Mrs. Bunch left her luggage upon the platform, the five o'clock train had not come alongside it. That circumstance does not seem to me to be very material, because a passenger can have no personal knowledge of it until he reaches the platform. What appears to me to be matter of more consequence in the present case is, that it was

Same Company
are liable
when passen-
ger is prosecut-
ing his journey.

Facts stated—
Bag in charge
of porter for
present transit.

Train not
drawn up—
Christmas eve
—Conversation
with porter.

Christmas eve; that there was a great crowd of passengers intending to travel by the train in question; and that the servants of the company, as might have been anticipated, were, at the time when Mrs. Bunch arrived at the station, inviting passengers to take tickets, and receiving their luggage for the purpose of its being put in the train. I attach no importance to the question put by Mrs. Bunch to the porter, or to his assurance, in reply, that her luggage would be quite safe, and that he would put it in the train. A conversation of that kind could not alter the contractual relations between her and the company.

On the assumption that the appellant company did become responsible for the safe keeping of the bag in question, it was argued on their behalf, that there was no evidence before the county court judge to justify the inference that its loss was due to their negligence.

Inference of negligence.

Upon that point I am of opinion that the evidence was sufficient to sustain the inference, but I am by no means satisfied that, in order to entitle them to judgment, the respondents were bound to prove that the appellants had been negligent. That depends upon the nature of a railway company's contract liability for hand-luggage, including in that term heavier articles, such as are commonly put in the van, when these are placed, or intended to be placed, with the assent of the company's servants in the carriage in which their owner intends to travel, as well as lighter articles which are generally, if not invariably, carried beside him.

It does not admit of question that passengers' luggage, duly delivered to the company's servants for carriage in the railway van, remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers, in cases where the passenger has assumed, in whole or in part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent judges have differed as to the nature of the contract under which hand-luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner, that is to say, with ordinary care, others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. Whichever of these views be accepted, it is manifest that, in many instances, the resulting liability of the company will be precisely the same, but, according to the second of them, the full responsibility of the company may revive on occasions when, from causes incidental to his journey, the interference of the passen-

Contract under which hand luggage is carried.

ger ceases for a time, and his hand-luggage is committed to the exclusive charge of their servants.

At present the ruling authority upon this point is *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221, where it appears to have been decided by the court of appeal, consisting of the noble and learned lord opposite (Lord Bramwell), the present Master of the Rolls, and Cotton L.J., that the contract of the company, with respect to hand-luggage, is merely to carry with ordinary care. Cotton L.J., who delivered the judgment of the court, said: "The company, therefore, must, according to ordinary principles be held liable in respect of those goods as bailees for hire and contractors to carry, and, therefore, liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself. This is our view on principle." The observations thus quoted were directed to the special case of a passenger's luggage which had been placed, at his request, and with the assent of the company, in the carriage in which he was to travel; and the learned judge possibly did not intend to extend the principle to luggage in the exclusive custody of the company's servants, for conveyance to or from the carriage. However that may be, I prefer the principle which appears to me to have been adopted in *Richards v. London, Brighton & South Coast R. Co.*, 7 C. B. 839; and *Butcher v. London & Southwestern R. Co.*, 16 C. B. 13. I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory.

I am, therefore, of opinion that the order of the court of appeal ought to be affirmed with costs.

LORD BRAMWELL.—My lords, it is the custom for English railway companies, at all events for the appellants, to have porters at the entrance of their railways to receive the luggage of passengers and convey it to the van or carriage in which it is to be carried. Whether this is a duty imposed on the companies, or a voluntary act on their part, is immaterial. It is a duty they undertake, at least this company does, and must, like other duties, be performed with skill, and without negligence.

What is this duty? I have said, to carry the passenger's

luggage to the van or carriage in which it is to be carried. We all know that large packages are taken to the luggage van—smaller packages (often much too large for the comfort of other travellers), are, if requested by the passenger, taken to the carriage in which the passenger is to be carried, either that he may make use of it, or take personal care of it, or, more frequently, that he may hasten away with it without waiting for it to be given out of the luggage van. There is no further duty, or professed duty, that I know of.

Duty as to luggage carried in carriage.

If the passenger arrives before the train is at the platform, whether of a terminal station or not, the porter may certainly refuse to do more than take the luggage on to the platform, and leave it there in charge of the passenger. Of course, if the passenger wants to get his ticket, and says so, the porter must take the luggage on to the platform and wait and see to it till the passenger has got his ticket and comes to see to it himself.

Duty of porter when passenger arrives before train.

If there is any duty beyond this, it is more than I know of or ever heard of; I mean any ordinary duty. There can be no duty on the company, or the porter, when the train is not at the platform, to take care of the luggage till it comes. If there is an obligation to do this for five minutes, there is an obligation to do it for as many hours. Every one knows it is not so; every one knows that a cloak-room is provided for the custody of luggage that the passenger wants to have taken care of till it can be put in the carriage in which it is to be carried. If this is true of luggage to be carried in the luggage carriage, and that is not there, it is equally true of luggage to be carried in the passenger carriage when the passenger is not there. If the luggage carriage is not there, the porter is not bound to take charge of the luggage till it comes. Of course, if he says nothing but takes it, and it is labelled for its destination and left in his charge, the passenger may well suppose, and has a right to suppose, that the company has taken charge of it for the journey. The passenger cannot tell whether the luggage carriage is there, or if not, whether the company is not content to take it to a place where it will be in readiness for the train when it comes, and be taken care of meanwhile.

So with respect to an article to be put in the passenger carriage, if the passenger should suppose a train he meant to go by was at the platform, and walked to it, and the porter said nothing, I should say that the passenger would have a right to suppose that the company had taken charge of the parcel, and was taking it to his intended carriage. But, if the porter said of luggage intended

Delivering hand baggage to porter.

for the luggage carriage, "That carriage is not here, you must look after your luggage yourself," and the passenger does not look after it, there would be no pretence for saying the company was liable. The same thing is true of luggage to be put in the passenger carriage. It must be remembered that luggage to go in the passenger carriage is to go in the same carriage as its owner, the passenger. Suppose a train at the platform, the passenger says, "I want this in the carriage with me," the porter proceeds with the parcel to the train, the passenger goes somewhere else, not for a minute or so, but for some sensible time, five or ten minutes, perhaps half-an-hour. Would he have a right to complain if his parcel was placed near the train the passenger said he was going by, or taken to the lost luggage room? I say No. If he would, on what ground? He must know that by not following and taking his seat he was attempting to impose a burthen on the company's servant which he had no right to impose. Mrs. Bunch knew that. She did not say, "You must take care of this," or "I want to go and meet my husband," but asks whether the bag will be safe. It will be said that it is not to be expected that she would speak with the precision of a lawyer, or know the law. I agree, but I say that treating this practically, she knew—everybody knows—that she was asking for a favor—for something to which she had no right. Does any one believe that if the porter had said, "I can take your luggage to the luggage carriage and it will be taken care of, but you must take care of what is to go with you till you have taken your place,"—I say if he had said this, as he ought to have done, would any one believe she would have had any right to complain or have been surprised? Always let it be remembered that she knew it was necessary to get some promise or engagement from the porter other and more than the ordinary engagement of a porter when he takes luggage.

Now a word as to what he said. Of course, it was not a promise or contract by him for himself or the appellants.

Effect of porter's remarks. Certainly there was no consideration for it. All it amounted to was a statement of intention—a holding out of an expectation. "Will it be safe?"

"Oh, yes; I will look after it." All that this means is, It will be safe, for I shall look after it. I say, then, that what the porter said did not impose a duty on the appellants which did not otherwise exist, that no duty existed in the appellants other than to carry the bag to the carriage in which she took her place if she took it forthwith; that if she did not take her place so that the porter could not give the parcel into her charge there, she left it in the care of the porter at her own

risk. I say she knew this, as is shown by her question to the porter and by her acceptance of his statement.

A word on the judgment below. Lord Esher says: "Now comes the case of luggage which is not to go into the van. The porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or to the carriage. During the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company." Be it so, but that is just what this bag was not. There was a time during which it was not in process of conveyance, a time during which it was stationary, during which the porter had said he would guard it. Lord Esher says: "The question is whether there was evidence upon which the county court judge might reasonably find for the plaintiffs." Evidence of what? Evidence of some fact on which he might reasonably so find? What fact? We know all the facts. Lindley L.J. says: "It seems to me a simple case of transit, not of entrusting to the porter in any sense than that in which everything put into his hands is entrusted to him. It is very true there was some short time during which it would not be necessary for him actually to keep walking or rolling his trolley. There was a short delay, but a delay so short as to make it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential to say more than this, that the porter was acting within the scope of his employment in taking the luggage in the way he did from the cab to the train." Now, that is precisely what he did not do. He did not take it from the cab to the train. He put it down and said he would guard it, and did not. As to the time being short, it was to be as long as the lady was away, and might have been forty minutes, or more, if the plaintiff had not arrived. I agree with Lopes L. J., 17 Q. B. D. 229. "It was not part of the employment of a porter to take charge of luggage except during that transit, i.e., from the cab to the train." I mean by that, during the time which is fairly and reasonably necessary for that transit; and see p. 229.

I make no remark on other authorities beyond this, that they show a generous struggle on the one hand to make powerful companies liable to individuals, and, on the other hand, an effort for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly.

I have not used a technical expression, not a word about bailments, etc. I have used plain and practical language. The appellants were under no duty to take care of the bag

while Mrs. Bunch went to look for her husband: the porter could and ought to, have refused to do so. Had he done so. Mrs. Bunch would have had no cause of complaint. By doing as he did he could impose no duty on the defendants which did not otherwise exist. Before the respondent can complain of negligence he must make out a duty of care—he has not done so. Not that I am sure it is a question of negligence. The sum in dispute is small, but I believe the question is of considerable importance. If the appellants are liable in this case, I do not know how they can avoid it in similar cases. It is certain that the porter exceeded his duty if he made the defendants liable, and I suppose other porters, from good nature or the hope of a tip, will do the same again, though expressly forbidden as this man was. The result of what took place is that the defendants are held liable for not taking care of the bag during the time it did not suit Mrs. Bunch to do so.

I cannot pretend to a doubt on the case. Nor can I understand the repeated expression that the county court judge might find as he did, an expression that imports he might have found otherwise. How can that be when the actual facts are not in dispute, nor the conclusions to be drawn from them? I hold that the judgment is wrong and should be reversed.

LORD HERSCHELL.—My lords, no appeal lies in this case from any conclusion of fact arrived at by the county court judge. It is only if he has erred in law that his judgment can be questioned. The single point, therefore, which has to be determined is, as it seems to me, whether there was any evidence to warrant the conclusion that the plaintiff's luggage was lost owing to a breach of obligation on the part of the defendants. It is not necessary for me to state the facts. They have been fully brought before the house by those of your lordships who have preceded me. I will only say that I do not think that the question put to the porter by Mrs. Bunch, or the answer given by him, really affects the case. If the company were under an obligation towards the plaintiff in respect of the bag, I cannot think that this question and answer diminished or destroyed it. If they were not under any such obligation, I do not think it was imposed upon them by the statement of the porter.

I concur entirely in the opinions which have been expressed by the noble and learned lord upon the woolsack and the noble and learned lord on my right (Lord Watson), and think it necessary to add but little.

Although there was a difference of opinion amongst the judges in the court below, and your lordships do not all take the same view, I think the difference is confined within somewhat narrow limits. I believe that all the judges who have dealt with the case and all your lordships are agreed, that if luggage is brought to a railway station and handed to a porter so long before the time appointed for the starting of the train, that it cannot be reasonably said to be entrusted to him for the purpose of its transit with the passenger to his destination, but must be considered as so entrusted for the purpose of being taken care of until the time for the departure of the passenger arrives, the porter is not the servant or agent of the company to undertake the custody and care of the luggage, and the company would not be liable for its loss. Railway companies have provided cloak-rooms or left-luggage offices, which are the proper receptacles for luggage brought to the station under such circumstances.

If luggage cannot be said to be entrusted to porter for purpose of transit company is not liable.

On the other hand, I do not understand my noble and learned friend (Lord Bramwell), who differs from the majority of your lordships, to doubt that the porter who receives a passenger's luggage at the entrance of the station for the purpose of conveying it to the train, does so only as the servant of the company, and that they are liable as well for the luggage which the passenger intends to take with him in the carriage as that destined for the van in case it is lost during its transit to either carriage or van owing to the porter's negligence. And I understand him further to entertain the view that though the traveller does not proceed direct to the train with his luggage, but stops for the purpose of taking his ticket, the company are nevertheless liable during the time so occupied.

Porter receiving luggage at station entrance.

Now, I do not think it can be laid down that procuring a ticket is the only act incidental to the journey for which the passenger may pause on his way to the train without the company being free from liability in case the luggage is lost in the meantime; would not the case be the same if he waited to meet a person who had promised to take his ticket for him, provided always he has not come unreasonably early, and does not wait an unreasonable time? Does, then, the fact that the train by which the passenger is to depart is not at the platform when he arrives at the station make any difference? It may, no doubt, be an element in determining whether the passenger has arrived so early that the transit to his destina-

For what passenger may pause on way to train—Fact that train has not arrived.

tion cannot properly be said to have commenced. But I do not think it is conclusive of the point, or that the obligation of the company is necessarily different from what it would be if the train were alongside the platform.

It is a matter of common knowledge, that the practice of different railway companies, and indeed of the same company at different times, varies greatly as to the length of the period prior to the departure of the train during which it is drawn up at the platform. Sometimes after being at the platform the train is shunted out of the station, and only returns immediately before its departure. Under these circumstances it is impossible even for a passenger who arrives very shortly before the time fixed for the departure of the train to know, when he alights at the station and entrusts his luggage to a porter, whether the train is at the platform or not. The question whether the luggage can fairly be said to be in the custody of the company's servant for the purpose of transit, or of what I may term warehousing, will not, I think, be generally difficult of solution, though as it is not possible to lay down any strict line of demarcation, there will always be cases on the border where opinions may differ as to the proper conclusion to be drawn. In the present case, Mrs. Bunch arrived forty minutes before the time of departure. She was about ten minutes waiting for her husband, who was to take her ticket. On the other hand, it was Christmas eve, when the trains are notoriously crowded, and prudence dictates an earlier arrival than usual. We have not to determine what would be our view of those facts. I concur with those of my noble and learned friends who think that the county court judge was warranted in point of law in arriving at the conclusion which he did with respect to them.

I have only to add that although it is not necessary in this ~~Duty as to~~ case to determine what is the nature of the ~~hand luggage.~~ duty devolving upon a railway company in respect of luggage carried or intended, to be carried, in the same carriage with the passenger, I am disposed to agree with my noble and learned friends in referring the view of this duty to be derived from the cases of *Richards v. London, Brighton, and South Coast R. Co.*, 7 C. B. 839, and *Butcher v. London and South Western R. Co.*, 16 C. B. 13, to that enunciated in the judgment of the court of appeal in *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221.

LORD MACNAGHTEN.—My lord, I concur in the motion which has been proposed.

Everybody who travels by railway knows that, as a general rule, persons arriving at a station with luggage are met at the entrance of the station by railway porters ready to receive their luggage, to take it to the platform, and to put it into the train. Everybody, too, knows that, while in ordinary course the heavier articles of luggage are labelled and placed in a van under the sole control and custody of the railway company, it is the common practice for passengers to take the lighter articles of luggage, or "hand-luggage," as it is called, in the carriage with them. This practice is recognized by railway companies, who provide suitable receptacles for hand-luggage in passenger carriages. And it is a practice as much for the convenience of railway companies as it is for the convenience of passengers.

It was contended by the appellants that in receiving a passenger's luggage, railway porters, though in the service of the company, and forbidden to accept any payment from the public, must be taken to be acting on behalf of the passenger, and as his agents, and that this relation continues as regards van-luggage until it is labelled for the journey, and as regards hand-luggage, until it is placed in the carriage in which the passenger intends to travel. Further, it was contended that the contract as regards van-luggage is altogether distinct and different from the contract as regards hand-luggage; that, in fact, there are two separate contracts, and that whatever may be the case as regards van-luggage, railway companies come under no liability of any sort as regards hand-luggage until it is placed in the passenger's carriage.

I cannot think this view correct. The services rendered by railway porters in receiving passengers' luggage, in taking it to the platform, and putting it into the train, are part of the ordinary facilities for passenger traffic which the public nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to afford. These services are covered by the fare which the passenger pays for his journey. They are offered in view of the contract which a person who presents himself with a luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, run from, or relates back to, the commencement of the journey; and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thence-

Custom of railways as to luggage.

Contracts as to van- and hand-luggage.

When journey as regards luggage commences—Carrier's contract

forward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely. The contract, no doubt, becomes modified as regards that part of the luggage which is put into the passenger's carriage. At the passenger's request, or at his instance, the company dispense with precautions which they think necessary for the safety of the goods they have undertaken to carry, and so the passenger relieves the company from some of the risks which otherwise would fall upon them. But, for all that, the contract is one contract, and in ordinary course, except so far as it may be modified by the acts or conduct of the passenger, it remains in force during the continuance of the journey from its commencement to its end. If the reasoning in *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221, seems to lead to a different conclusion, with all deference I am unable to concur in it. I prefer the view expressed by Willis J. in *Talley v. Great Western R. Co.*, Law Rep. 6 C. P. 44.

Your lordships are familiar with the evidence in the case, and I do not propose to repeat it. It is enough to say that

Facts stated. on the 24th of December, 1884, at 4.20 P.M., Mrs. Bunch came to Paddington with a Gladstone bag and some other luggage, meaning to travel with her husband by the 5 P.M. train to Bath, that on her arrival at the station the luggage was received by a porter in the employment of the company, and taken by him to the platform for the purpose of the journey, and that the Gladstone bag was last seen on the platform with the same porter a few minutes afterwards. From that time all trace of the bag is lost. The porter and the bag both vanish from the scene. It was suggested by the learned counsel for the appellants, by way of explanation, that the porter was possibly one of a number of men picked up by the company for the day to meet the pressure of Christmas traffic. But I may observe, in passing, that so far as the public was concerned, there was apparently nothing to distinguish the casual helper, of whom little if anything was known, from the regular and trusted servants of the company.

On these bare facts standing alone it seems to me that there would be evidence upon which the county court judge might reasonably find for the plaintiff, even if the company were not under the liability of common carriers as regards the lost bag.

But then it was contended with much earnestness that it ought to have been inferred from the circumstances of the case and from Mrs. Bunch's conduct that at the time of the loss the bag was not in the custody of the company for the purpose of the journey. It was said that Mrs. Bunch came to the station too soon—that she came before the train was drawn up—that she broke the journey, if the journey is to be taken as having begun—and left the bag in the charge of a porter who was then not acting as the servant of the company within the scope of his authority as such, but acting as her agent in his individual capacity, and that if this was not what she meant, it was an attempt on her part to saddle the company with a liability which they were not bound to undertake.

It seems to me that there is no substance in any of these objections. Mrs. Bunch, no doubt, came to the station somewhat early. But the one thing railway companies try to impress on the public is to come in good time. And considering the crowd likely to be attracted by cheap fares during the Christmas holidays, and the special bustle and throng on Christmas eve, it does not seem to me that Mrs. Bunch came so unreasonably early as to relieve the company who received the luggage from the ordinary obligations flowing from that receipt. It is impossible to define within the extreme limits on both sides the proper time for arrival. Everything must depend upon the circumstances of the particular case. But among those circumstances, the least important, as it seems to me, is the time when the train is drawn up at the departure platform. That is, as everybody knows, a very variable time. And it is a matter over which the passenger has no control, and of which he can have no notice before he comes to the station.

Then I think there is nothing in the conversation which took place between Mrs. Bunch and the porter. Mrs. Bunch's question was a very natural one. The answer she received was just what might have been expected. Nine women out of ten parting with a travelling bag on which they set any store would ask the same question. In ninety-nine times out of a hundred the same answer would be returned. I do not think that this conversation altered the relation between the parties in the least degree. It seems to me almost absurd to treat it as a solemn negotiation by which the lady abdicated such rights as she possessed against the Great Western R. Co., and constituted this ephemeral and evanescent porter in his individual capacity the sole custodian of her Gladstone bag.

Nor can it, I think, be said that Mrs. Bunch broke the

journey by leaving the platform to meet her husband and get her ticket. To take a ticket is a necessary incident of a railway journey. It is, at least, a very common incident in railway travelling for persons, who intend to travel in company, whether they be members of the same family or not, to meet by appointment in the railway station from which they mean to start, and it is certainly not unusual in such a case for the purchase of tickets to be deferred until the meeting takes place.

It may be that a passenger who has delivered his luggage to a porter at the entrance of the station, though the delivery is in proper time for the intended journey, is not entitled as of right and under all circumstances to consider the company responsible for the safe keeping of his luggage before it is put into the train. A passenger knows that he is not the only person to be attended to, and it might not be unreasonable to hold that there is an implied agreement on his part that he will be ready to resume possession of his luggage if the exigencies of the traffic require that it should be handed back to him in the interval before the time comes to put it into the train. No such question, however, arises here. The lost bag was not left unguarded owing to the exigencies of traffic, or neglected by the porter who took it in consequence of the pressure of conflicting duties. But I desire to say that, for my part, I am not satisfied that a passenger's luggage which has been received by the company's servants, and taken to the platform, lies there at the risk of the passenger, if he is not ready forthwith, or the moment he has got his ticket, to step into the train.

It was said that if everybody acted as Mrs. Bunch acted in this case, railway companies would require an army of porters, and that it would be almost impossible for them to carry on their business. I quite agree; but I am not much impressed by that observation. I apprehend that if all travellers acted precisely alike, if everybody arrived at a station for a particular journey at precisely the same moment, though the time of arrival were the fittest that could be imagined, there would be no little confusion, and perhaps some consternation, among the railway officials. Whatever may be the result of your lordships' judgment, there is no fear that it will have the effect of making everybody act alike. Some passengers will still give more trouble at the stations than others, but no one will give any more trouble for it. Things will go on just as usual. The fidgety and the nervous will still come too soon; the unready and the unpunctual will still put off their chance of arrival till the last moment, and the prudent may have their calculations

upset by the many accidents and hindrances that may be met with on the way to the station. And it is just because of the irregularity of individuals that the stream of traffic is regular and easily managed.

In the result, therefore, I am of opinion that the majority of the court of appeal were right in the view they took. The nature of the case requires that a broad view should be taken. The contract between the company and the passenger is not a contract in writing, defining with mathematical accuracy the precise limits of the incidental services which the company are prepared to render, and punishing every transgression, every attempt on the part of the passenger to exact more than his just measure of attention, with the loss of that security which belongs to a contract by common carriers. Railway companies do their best to adapt the conduct of their business to the habits of the travelling public, who resent nothing so much as petty and vexatious regulations; and so the contract becomes moulded in matters incidental to its main purpose by that which is, and is known to be, the ordinary and every-day practice of railway companies. A narrow, technical, and jealous view of the rights of individual passengers might, perhaps, enable railway companies to escape liability in some few cases: I much doubt whether it would tend to their advantage in the long run.

Contracts of passengers with carriers in general.

Order appealed from affirmed, and appeal dismissed with costs.

See *Bunch v. Great Western R. Co.*, 26 Am. & Eng. R. R. Cas. 137, note, 148; *Illinois Cent. R. Co. v. Troustine*, 31 Am. & Eng. R. R. Cas. 99, note, 101.

BLUMENTHAL

v.

MAINE CENTRAL R. CO.

(Maine Supreme Judicial Court. December 17, 1887.)

Passengers' Baggage—Merchandise—Liability of Company.—A railroad company is not bound by the sale of a ticket to a passenger to carry merchandise offered as baggage, and is not liable as common carrier for the loss of merchandise so offered and received by it without any intimation of its true nature.

Same—Notice to Other Passenger Agents.—The fact that other agents had at other times and places received and checked the merchandise as

baggage with knowledge of its true nature will not operate as notice to the company of its nature as to the trip during which it was lost.

ON report from Kennebec Superior Court.

Assumpsit against the Maine Central R. Co. to recover the value of a valise and its contents checked as baggage at Bangor for Augusta. The opinion states the case.

F. E. Southard for plaintiff.

Baker, Baker & Cornish for defendant.

EMERY, J.—The plaintiff's story is substantially as follows. Just before the morning train was leaving for Augusta, he was at the Bangor station of the Maine Central Railroad, the defendant company, with a large valise, around which an oil-cloth cover was strapped with a common shawl-strap. This valise contained no personal baggage for use upon a journey, but only merchandise for sale. He purchased of the company's ticket agent a passage ticket for Augusta, and then having his ticket in his hand took the valise to the baggage master, and asked him to check it for Waterville, and received from him a check therefor. He did not inform the baggage master of the contents of the valise, but held the passage ticket so it could be seen. The baggage master made no inquiries. The plaintiff went to Augusta on the same morning train, giving up his passage ticket to the conductor. A few days later he presented his baggage check to the baggage master of the railroad company at Waterville, but his valise could not be found there. He has made no inquiries at Bangor, and has made no other effort to find his valise. He has now brought this action against the railroad company to recover the value of the merchandise, alleging, as a cause of action, its obligation to transport the merchandise safely, and its failure to do so.

The plaintiff's purchase of a passage ticket entitled him to safe transportation of himself and his personal baggage on the same train. It entitled him to nothing else. The company was thus under that obligation, but under no other obligation to him. There was created no obligation to transport the plaintiff's merchandise. *Wilson v. Railway*, 56 Me. 60. By going as he did with his valise to the baggage master, and asking for a baggage check for Waterville, without stating the contents of the valise, he evidently meant the baggage master to believe that he was intending to take passage on the train then about to leave, and that the valise contained only personal baggage, such as he was entitled to take with him as a passenger. The check was given him in that belief. He thus

Transporta-
tion of mer-
chandise as
baggage.

committed a fraud upon the company to obtain free transportation of his merchandise. His fraud, however, did not impose upon the company such an obligation. The baggage-master received the valise upon the implied assurance of the plaintiff that it contained personal baggage only. If that assurance was false, and the valise contained no personal baggage, neither the baggage master nor the company were bound to forward it, though they had received it.

The plaintiff further testified, however, that other baggage masters of the same company at other stations knew the usual contents of the valise, and he now urges that the company thus had notice of the contents at the time it was received by the Bangor baggage master. Same—Notice to company's agents. Notice to other baggage masters at other times and other places of matters existing only at those times and places, cannot affect the company at this time and place, where its only eyes and ears in this matter were those of its Bangor baggage master. The other baggage masters had nothing to do with the Bangor station, and were not servants of the company there.

Of course, the baggage master, having received the valise, could not lawfully throw it away, destroy it, or convert it, and if he or any of the company's servants had done so, the company may be liable therefor. There is no such evidence in this case, however. The valise may still be at Bangor waiting for the plaintiff to remove it, or, if lost, may have been lost without fault of the company. This action is for failure to transport safely, and the evidence does not show any such obligation on the company. Judgment for defendant.

PETERS, C. J., WALTON, DANFORTH, VIRGIN, and FOSTER, J.J., concurred.

What is Baggage.—See *Henderson v. Louisville & N. R. Co.*, and note, 31 Am. & Eng. R. R. Cas. 95, 97; *Pfister v. Central Pac. R. Co.*, and note, 27 Am. & Eng. R. R. Cas. 246—256; *Kansas City, etc., R. Co. v. Morrison*, and note, 23 Ib. 481—486; *Lake Shore, etc., R. Co. v. Warren*, 21 Ib. 286; *Anderson v. Wabash, etc., R. Co.*, 18 Ib. 377; *Denver, etc., R. Co. v. Roberts*, 18 Ib. 627; *Texas, etc., R. Co. v. Capps*, and note, 16 Ib. 118, 121; *Texas, etc., R. Co. v. Ferguson*, 9 Ib. 395.

Merchandise as Baggage.—A contract to carry a passenger implies a contract also to carry, without additional charge, his reasonable and ordinary baggage. *Hutchings v. Western A. R. Co.*, 25 Ga. 61; *Chicago & R. I. R. Co. v. Fahey*, 52 Ill. 81; *Cincinnati & C. A. L. R. Co. v. Marcus*, 38 Ill. 219; *Woods v. Devin*, 13 Ill. 746; *Perkins v. Wright*, 37 Ind. 27; *Wilson v. Grand Trunk R. Co.*, 56 Me. 60; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *Smith v. Boston & M. R. Co.*, 44 N. H. 325; *Merrill v. Grinnell*, 30 N. Y. 594; *Fairfax v. New York Cent. & H. R. R. Co.*, 37 N. Y. Sup. Ct. (5 J. & S.) 516; *Hirschsohn v. Hamburg Am. Packet Co.*, 34 N. Y. Sup. Ct. (2 J. & S.) 521; *Glasco v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 557; *Powell v. Meyers*, 26 Wend. (N. Y.) 591; *Pardee v.*

Drew, 25 Wend. (N. Y.) 459; Camden & A. Trans. Co. *v.* Burke, 13 Wend. (N. Y.) 611; Orange County Bank *v.* Brown, 9 Wend. (N. Y.) 85; Peixotti *v.* McLaughlin, 1 Strobb. (S. C.) 468; Hanibal & St. J. R. Co. *v.* Swift, 79 U. S. (12 Wall.) 262; bk. 20 L. ed, 423; The Elvira Harbeck, 2 Blatchf. C. C. 336.

As the carrier of such baggage the carrier of the passenger incurs the full responsibility of a common carrier of goods and becomes an insurer of its safety against every accident which is not the act of God or the public enemy, or the fault of the passenger himself. See Hutchins *v.* Western R. 25 Ga. 61; Dibble *v.* Brown, 12 Ga. 217; Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348; Chicago & R. I. R. Co. *v.* Fahey, 52 Ill. 81; Illinois Cent. R. *v.* Copeland, 24 Ill. 332; Davis *v.* Michigan S. & N. Ind. R. Co., 22 Ill. 278; Woods *v.* Devin, 13 Ill. 746; Perkins *v.* Wright, 37 Ind. 27; Warner *v.* Burlington & M. R. R. Co., 22 Iowa 166; Moore *v.* Str. Evening Star, 20 La. An. 402; Blossman *v.* Hooper, 16 La. An. 160; Jordan *v.* Fall River, R., 59 Mass. (5 Cush) 69; Merrill *v.* Grinnell, 30 N. Y. 594; Fairfax *v.* New York Cent. & H. R. R. Co., 37 N. Y. Sup. Ct. (5 J. & S.) 516; Holdridge *v.* Utica B. R. R. Co., 56 Barb. (N. Y.) 191; Chamberlain *v.* Western Trans. C. Co., 45 Barb. (N. Y.) 218; Glasco *v.* New York Cent. R. Co., 36 Barb. (N. Y.) 557; Blanchard *v.* Isaacs, 3 Barb. (N. Y.) 388; Gore *v.* Norwich & N. Y. T. Co., 2 Daly (N. Y.) 254; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 586; Duffy *v.* Thompson, 4 E. D. Smith (N. Y.), 178; Powell *v.* Myers, 26 Wend. (N. Y.) 591; Pardee *v.* Drew, 25 Wend. (N. Y.) 459; Camden & A. R. & Trans. Co. *v.* Belknap, 21 Wend. (N. Y.) 354; s. c., 2 Am. Ry. Cas. 496; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251; Hollister *v.* Nowden, 19 Wend. (N. Y.) 234; Camden & A. Trans. Co. *v.* Burke, 13 Wend. (N. Y.) 611; Orange County Bank *v.* Brown, 9 Wend. (N. Y.) 75; Sewall *v.* Allen, 6 Wend. (N. Y.) 335; s. c., 2 Wend. (N. Y.) 327, 341; Beckman *v.* Shouse, 5 Rawle (Pa.), 179; Dill *v.* South Carolina R. Co., 7 Rich. (S. C.) L. 158; Peixotti *v.* McLaughlin, 1 Strobb. (S. C.) 468; Johnson *v.* Stone, 11 Humph. (Tenn.) 419; Bomar *v.* Maxwell, 9 Humph. (Tenn.) 621; Wilson *v.* Chesapeake & O. R. Co., 21 Gratt. (Va.) 654; Hannibal & St. J. R. Co. *v.* Swift, 79 U. S. (12 Wall.) 262; bk. 20 L. ed. 423; Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 618; Le Conteur *v.* London & S. W. R. Co., 1 L. R. Q. B. 54, 59; Bayliss *v.* Lintott, L. R. 8 C. P. 345; Talley *v.* Great Western R. Co., L. R. 6 C. P. 44; Brooke *v.* Pickwick, 4 Bing. 218, 222; Christie *v.* Griggs, 2 Campb. 80; Midland R. Co. *v.* Bromley, 17 C. B. 372; Butchers *v.* London & S. W. R. Co., 16 C. B. 13; Oxlade *v.* North Eastern R. Co., 15 C. B. N. S. 680; Great Western R. Co. *v.* Goodman, 12 C. B. 313; Marshall *v.* York, N. & B. R. Co., 11 C. B. 655; Richards *v.* London & S. Coast. R. Co., 7 C. B. 839; Clarke *v.* Gray, 6 East, 564; Williams *v.* Great W. R. Co., 10 Ex. 15; Johnson *v.* Midland R. Co., 4 Ex. 367, 372; Stewart *v.* London & N. W. R. Co., 3 H. & C. 135; Cohen *v.* South Eastern R. Co., L. R. 2 Ex. Div. 253; Walsh *v.* The H. M. Wright, 1 Newb. 494; Coggs *v.* Bernard, 2 Ld. Raym. 909; s. c., 1 Smith's Lead. Cas. 283; 2 Kent's Com. 527; 2 Kent Com. sect. 40, p. 600, 601 (14th ed.)

The baggage of passengers which a carrier undertakes by his contract to carry consists of such articles of personal convenience or necessity as are usually carried by passengers for their personal use. Dibble *v.* Brown, 12 Ga. 217; Parmela *v.* Fischer, 22 Ill. 212; Toledo & W. R. Co. *v.* Hammond, 33 Ind. 379; Doyle *v.* Kiser, 6 Ind. 242; Baltimore S. P. Co. *v.* Smith, 23 Md. 402; Stimson *v.* Connecticut R. R. Co., 98 Mass. 83; Smith *v.* Boston & M. R., 45 N. H. 325; Hawkins *v.* Hoffman, 6 Hill (N. Y.), 585; Pardee *v.* Drew, 25 Wend. (N. Y.) 459; Duffy *v.* Thompson, 4 E. D. Smith (N. Y.), 178; Cahill *v.* London & N. W. R. Co., 10 C. B. N. S. 154, aff'd on error 13 C. B. N. S. 818; Munster *v.* South Eastern R. Co., 4 C.

B. N. S. 676; 4 Jur. N. S. 738; 27 L. J. C. P. 308; *Belfast v. Ballymenan R. Co. v. Keys*, 9 H. L. Cas. 556. Merchandise and valuables, although carried in the trunks of passengers, are not baggage, and where the carrier of passengers does not undertake to transport them as such, he will not be liable for the loss thereof, see *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 818; *Great Northern R. Co. v. Shepherd*, 8 Ex. 30; *Belfast R. Co. v. Keys*, 9 H. L. Cas. 566; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, except in case of gross negligence. *Alling v. Boston & A. R. Co.*, 126 Mass. 121; *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322. Thus it has been held that samples of silk taken by a merchant's clerk with him in his trunk (*Hawkins v. Hoffman*, 6 Hill (N. Y.), 586); a muff, sack, and silver napkin-ring in a gentleman's trunk (*Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510); a masquerade costume carried in a trunk to be used at a ball (*Michigan S. & N. I. R. Co. v. Oehm*, 56 Ill. 293), and a feather bed not intended for use upon the journey (*Connolly v. Warren*, 106 Mass. 46; however, it would be different where the bed was intended for use); merchandise (*Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671), such as a box of jewelry (*Richards v. Westcott*, 2 Bosw. (N. Y.) 589), silverware (*Bell v. Drew*, 4 E. D. Smith (N. Y.), 59), a stock for shoes and shoe-nails (*Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506), a child's spring horse (*Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366), and articles of virtu, such as paintings, statuary, and antiquarian or geological specimens (see *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278; *Stimson v. Connecticut R. R. Co.*, 98 Mass. 83), have all been held not to come within the term "baggage."

Merchandise Packed in Baggage.—The carriers of passengers are not liable for merchandise when packed in the traveller's baggage in such a manner as not to disclose the fact that it is not all proper baggage, and the baggage is lost; in such a case it will be presumed that the carrier was misled into receiving it, whether the passenger intended to deceive him or not, and for that reason would be entitled to claim all the privileges of a gratuitous bailee. See *Alling v. Albany R. Co.*, 126 Mass. 121; *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506; *Haynes v. Chicago, St. P., M. & O. R. Co.*, 29 Minn. 160; *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 818. Thus where wares and samples are stowed away in trunks, valises, carpet-bags, chests, and the like, with other common travelling contents, they are not baggage, and cannot be recovered for as such if lost. *Stimson v. Connecticut R. R. Co.*, 98 Mass. 83; *Mississippi R. Co. v. Kennedy*, 41 Miss. 671; *Cahill v. London & N. W. R. Co.*, 10 C. B. N. S. 154; s. c., 13 C. B. N. S. 818. But where a carrier has notice that articles are included in a passenger's luggage which are not properly baggage, such carrier will be liable for their loss. *Great Northern R. Co. v. Shepherd*, 8 Ex. 30; *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 818. Because, as it has been said, "any carrier who knows that he is transporting certain property may silently reserve his right to charge for the service at the end of the journey; and hence the inclination shown in some late railway precedents of the highest importance to charge the passenger carrier to the full extent of a common carrier of freight, where he receives from a *bona fide* passenger articles which, packed so as not to have a false appearance of baggage, were offered to him in good faith; both parties being silent as to making a charge for their carriage." See *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan. 55; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 271; bk. 20, L. ed. 423; *Great Northern R. Co. v. Shepherd*, 8 Ex. 30; s. c., 9 Eng. L. & Eq. 477.

In all cases where merchandise is so packed with baggage as to be obviously merchandise to the eye, and the carrier takes it without objection,

he is liable for its loss. See *Minter v. Pacific R. Co.*, 41 Mo. 503; *Glasgo v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 557; *Butler v. Hudson R. R. Co.*, 3 E. D. Smith (N. Y.), 571; *Great Northern R. Co. v. Shepherd*, 8 Ex. 30; s. c., 9 Eng. L. & Eq. 369. But it is said that where a passenger carrier receives for a special recompense what he knows is not baggage, the undertaking he assumes is to be regarded as one for carrying such articles as a common carrier; not as a carrier for special baggage, but rather as any other carrier of freight. See *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506; *Slowman v. Great Western R. Co.*, 67 N. Y. 208; *Perley v. New York Cent. R. Co.*, 65 N. Y. 379; *Glasgo v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 557; *Strouss v. Wabash, St. L. & P. R. Co.*, 17 Fed. Rep. 209.

While articles of merchandise are not baggage, as a general rule, yet when they are so packed that the carrier can see and must know that it is merchandise and not baggage, if it is accepted for carriage he will be liable for its loss the same as though it was proper baggage. *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262; bk. 20, L. ed. 423; *Great Northern R. Co. v. Shepherd*, 8 Ex. 30. But it will not be sufficient to show that there was apparent on the face of the package enough to direct the carrier's attention to it, and to have caused him to make inquiry. To render the carrier liable it must be shown positively that he had actual knowledge that the thing carried was merchandise and not baggage. See *Dibble v. Brown*, 12 Ga. 217; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348; *Chicago, R. I. & P. R. Co. v. Collins*, 56 Ill. 212; *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *Smith v. Boston & M. R. Co.*, 44 N. H. 325; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Richards v. Westcott*, 2 Bosw. (N. Y.) 489; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Hellman v. Holladay*, 1 Woolw. C. C. 565; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612; *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366; *Harris v. Great Western R. Co.*, 1 Q. B. Div. 515; *Cahill v. London & N. W. R. Co.*, 10 C. B. N. S. 154; s. c., 13 C. B. N. S. 818; *Great Northern R. Co. v. Shepherd*, 8 Ex. 30.

Merchandise for Family Use.—Some of the cases hold that in addition to a passenger's own baggage, within the general definition of that term, he may also include articles of clothing and various other articles purchased by him when from home, and travelling without any other member of his family, for use by his family or some member thereof. See *Dexter v. Syracuse, B. & N. Y. R. Co.*, 42 N. Y. 326; s. c., 1 Am. Rep. 527. Particularly in those cases where the cloth is cut up into patterns for garments. *Deffy v. Thompson*, 4 E. D. Smith (N. Y.), 170. However, it would seem that a great quantity of goods, such as new shoes or stock for shoes, or cloth for pants, whether wrought into garments or not, is to be considered as merchandise, and not properly baggage in any sense of the term. See *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506. And so also is uncut cloth for dresses purchased, and being carried in like manner by the passenger in his trunk, for one not a member of his family. *Dexter v. Syracuse, B. & N. Y. R. Co.*, 42 N. Y. 326; s. c. Am. Rep., 527.

Merchandise Carried for Presents or Accommodation.—The law declines to treat as baggage that which the passenger takes with him as a present to his friend, or to accommodate third parties, with whom the carrier is not in privity, and from whom such carrier is to get no profit. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 425. See *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510; *Dexter v. Syracuse, B. & N. Y. R. Co.*, 42 N. Y. 326. Thus silverware, knives, forks, spoons, and the like are not in any sense proper baggage for the passenger, and when included with it no recovery can be had therefor in case of loss. See *Giles v. Fauntleroy*, 13 Md. 126; *Pettigrew v. Barnum*, 11 Md. 434; *Mississippi Cent. R. Co.*,

v. Kennedy, 41 Miss. 671; *Richards v. Westcott*, 2 Bosw. (N. Y.) 589; *Bell v. Drew*, 4 E. D. Smith (N. Y.), 59.

Watches as Baggage.—A single watch and other articles of personal jewelry have been held to be a part of a traveller's proper baggage for which a recovery can be had in case of loss. *Doyle v. Kiser*, 6 Ind. 242; *American Contract Co. v. Cross*, 8 Bush (Ky.), 472; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 226; *McCormick v. Hudson R. R. Co.*, 4 E. D. Smith (N. Y.), 181; *Jones v. Voorheis*, 10 Ohio, 145; *McGill v. Rowand*, 3 Pa. St. 451; *Brooke v. Pickwick*, 4 Bing. 218. *Compare* *Mintur v. Pacific R. Co.*, 41 Mo. 503; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 621. However, it is otherwise as to a quantity of watches, jewelry, or plate apparently designed for sale and traffic, or for presents to friends. *Chicago A. L. R. Co. v. Marcus*, 38 Ill. 219; *Mississippi R. Co. v. Kennedy*, 41 Miss. 671; *Richards v. Westcott*, 2 Bosw. (N. Y.) 589; *Bell v. Drew*, 4 E. D. Smith (N. Y.), 59.

Money as Baggage.—It has been held that a reasonable amount of money included in a passenger's trunk or otherwise secreted in his baggage, *bond fide* intended for travelling expenses and personal use, is baggage within the meaning of the term (see *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Davis v. Michigan R. Co.*, 22 Ill. 278; *Jordan v. Fall River R. Co.*, 59 Mass. (5 Cush.) 69; *Merrill v. Grinnell*, 30 N. Y. 594; *Merritt v. Earl*, 29 N. Y. 115; *Mudgett v. Bay State Steamship Co.*, 1 Daly (N. Y.), 151; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Reid v. Compagnie Transatlantique*, 1 N. Y. City Ct. 16. *Contra*, see *Hutch. Car.* 539, 1), where it does not exceed in amount what a prudent person would deem proper and necessary for that purpose; but no money beyond that amount. *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278; *Doyle v. Kiser*, 62 Ind. 242; *Yznaga v. Steamboat Richmond*, 27 La. An. 90; *Whitmore v. Caroline*, 11 Mo. 515; *Weeks v. New York, N. H. & H. R. Co.*, 9 Hun (N. Y.), 609; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *First National Bank v. Marietta R.*, 20 Ohio St. 259; *Johnson v. Stone*, 11 Humph. (Tenn.) 119, or where it is intended for other purposes. *Dunlap v. Steamboat Co.*, 98 Mass. 371; *Phelps v. Railway Co.*, 19 C. B. N. S. 321. It has been said that "an attempt by a passenger to have an unreasonable amount of money carried among his baggage, as baggage, by concealment therein, or without making the same known to the company, is a fraud upon the company, and no responsibility will attach to it for the loss thereof" (*Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278; *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578; *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506); because in such case it is the duty of the passenger to report the same to the company and to pay such extra charge for its transportation as the company may justly demand. See *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278; *Brown v. Camden & A. R. Co.*, 83 Pa. St. 316; s. c., 15 Am. Ry. Rep. 421.

On the contrary, there are a number of well-considered cases which hold that a passenger will not be allowed to carry money as baggage, even to the amount which is reasonably necessary for travelling expenses and personal use. See *Illinois C. R. Co. v. Copeland*, 24 Ill. 332; *Doyle v. Kiser*, 6 Ind. 242; *Del Valle v. Steamer Richmond*, 27 La. An. 90; *Simon v. Miller*, 7 La. An. 360; *M. & T. Bank v. Gordon*, 5 La. An. 64; *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *Duffy v. Thompson*, 4 E. D. Smith, 178; *Grant v. Newton*, 1 E. D. Smith, 95; *Johnson v. Stone*, 11 Humph. (Tenn.) 419; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 621.

Money which is not taken *bond fide* to pay passage and current expenses can in no instance be allowed for as baggage when lost, such as money carried by an attorney for his client to meet the contingencies of a law

suit (*Phelps v. London N. W. R. Co.*, 19 C. B. N. S. 321), or money belonging to a stranger instead of the passenger, where the owner is not travelling with it. *Dunlap v. International Steamboat Co.*, 98 Mass. 371. And the same is true of money which is intended purely for trade, business, investments, or transportation, and not for the passenger's own use.

See, generally, *Pfister v. Central Pac. R. Co.*, 27 Am. & Eng. R. R. Cas. 246; *Missouri Pac. R. Co. v. York*, note, 18, Ib. 627.

Jewelry as Baggage—Notice.—It has been held that baggage includes valuable jewelry and miniatures carried by a lady as such (see *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 286; *McCormick v. Hudson R. R. Co.*, 4 E. D. Smith (N. Y.), 181; *Magill v. Rowan*, 3 Pa. St. 452), but where jewelry and other articles are not intended for use by the passenger but are carried as a gift for friends, the rule is otherwise. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 286.

Where the carrier has notice and there is a loss the passenger may recover. Thus it has been held by the United States circuit court for the West District of Missouri in the case of *Jacobs v. Tutt*, 33 Fed Rep. 412, that where, in an action against a railroad company to recover the value of a trunk and contents, which were stolen from the company, and it was shown that it was a trunk of a jewelry salesman, containing his stock in trade; that the agent who checked it knew of the fact; and that the plaintiff made no effort at concealment, the company will be liable as for loss of ordinary baggage. The court say: "The defendant's station agent at Wakenda having checked the trunk in question as baggage, his knowledge that it contained jewelry, and without any concealment practised by the plaintiff as to the contents of said trunk or the value of the same, the plaintiff is not estopped from demanding full compensation for the trunk and its contents as though the contents were in fact ordinary baggage and not merchandise. *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. (10 Otto), 27, 28; bk. 25 L. ed. 531.

Sample Trunk as Baggage.—Trunks, valises, carpet-bags, chests, and the like, with the common travelling contents, are always ordinary baggage, but when filled with samples of merchandise, which the passenger is taking with him for the purpose of effecting sales, they are not baggage. *Dibble v. Brown*, 12 Ga. 217; *Chicago, etc., R. Co. v. Marcus*, 30 Ill. 217; *Alling v. Boston & A. R. Co.*, 126 Mass. 121; *Pennsylvania Co. v. Miller & Co.*, 35 Ohio St. 541; *Strouss v. Wabash, St. L. & P. R. Co.*, 17 Fed. Rep. 209; *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 818. Thus where a trunk containing valuable merchandise and nothing else, was taken on board a steamboat and deposited with ordinary baggage as such, and afterward lost, it was held that the carrier was not liable therefor. *Pardee v. Drew*, 25 Wend. (N. Y.) 459.

Merchandise Taken into Car by Passenger.—Where a passenger seeking to evade the rules of a railway which forbids merchandise to be carried by passengers without the payment of extra charges therefor, carries merchandise with him to his seat in the passenger coach, and a servant of the company, on the journey, has it taken from the passenger coach, whither he had brought it, and placed in the baggage car, the passenger will not be permitted to recover for its loss. *Belfast R. Co. v. Keys*, 9 H. L. 556. See *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348; *Flint & P. M. R. Co. v. Wier*, 37 Mich. 111; *Smith v. Boston & M. R. Co.*, 44 N. H. 325; *Cahill v. London & N. W. R. Co.*, 10 C. B. N. S. 154; s. c., 13 C. B. N. S. 818.

Refusal to Carry.—It was recently held by the supreme court of appeals of Virginia in the case of *Norfolk & W. R. Co. v. Irvine*, 5 S. E. Rep. 532, that a rule by a railroad company, that only baggage containing passengers' wearing apparel should be transported on passenger trains, is a reasonable rule; and one who was in the habit of transporting his ped-

dealer's wares as baggage, who refused to state that his trunk offered for transportation contained nothing but wearing apparel, has no cause of action for damages for refusal to carry such trunk. The court say that "the company can not be required to transport merchandise or other freight not baggage on its passenger trains which have not been equipped for such use; and the plaintiff having exacted such service of these trains as a travelling merchant, if he had ceased such employment and business, it was a simple and easy act for him to so certify. A carrier of passengers is only required to carry baggage under a certain weight, and may by law, or otherwise, restrict the amount to be carried for any one passenger so the limit does not rest below that fixed by the statute, and may also refuse to carry anything as luggage except the passenger's ordinary luggage. *Phelps v. London & N. W. R. Co.*, 19 C. B. N. S. 321. And a railroad company may refuse to carry merchandise as personal luggage or anything except what is useful and necessary or convenient for the passenger's personal comfort and convenience. *Dibble v. Brown*, 12 Ga. 217; *Doyle v. Kiser*, 6 Ind. 242; *Stimson v. Connecticut R. Co.*, 98 Mass. 83; *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506; *Smith v. Boston & M. R. Co.*, 44 N. H. 325; *Merrill v. Grinnell*, 30 N. Y. 594; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *The Ionie*, 6 Blatchf. C. C. 538. It has been decided in a multitude of cases that a passenger cannot carry merchandise in his baggage to avoid the payment of freight upon it and recover for its loss against the company; and this rule extends to samples carried by a travelling salesman while upon the road. *Hutchings v. Western R. Co.*, 25 Ga. 61; *Dibble v. Brown*, 12 Ga. 217; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348; *Blumantle v. Fitch*, 127 Mass. 322; s. c., 20 Alb. L. J. 354; *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *Ross v. Missouri R. Co.*, 4 Mo. App. 583; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Smith v. Boston R. Co.*, 3 E. D. Smith (N. Y.), 59; *Beckman v. Shouse*, 5 Rawle (Pa.), 179; *Lee v. Grand Trunk R. Co.*, 36 Up. Can. Q. B. 350; *Cahill v. London & N. W. R. Co.*, 10 C. B. N. S. 154; s. c., 7 Jur. 1164; 30 L. J. C. P. 289, 9 Week. Rep. 653; 4 L. T. N. S. 246 (aff'd on appeal 13 C. B. N. S. 818; 8 Jur. N. S. 1063; 31 L. J. C. P. 271; 10 Week. Rep. 391); *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; s. c., 7 Eng. R. Cas. 31; 21 L. J. Ex. 286; *Belfast & B. R. Co. v. Keys*, 9 H. L. Cas. 556; s. c., 8 Jur. 367; 9 Week. Rep. 793; 4 L. T. N. S. 841.

Penalty for Refusal to Carry.—In the case of *Norfolk & W. R. Co. v. Irvine*, 5 S. E. Rep. 532, the supreme court of appeals of Virginia held that under a statute providing that if a statute giving a penalty did not expressly mention that such penalty should be in lieu of damages, a party injured might recover the actual amount of damages suffered by reason of the breach of such statute, and that a plaintiff, who has been injured by a failure of a railroad company to transport his baggage, is not limited to a recovery of the penalty prescribed for such failure by Code Va. c. 61, §. 17, but may recover the amount of actual damages. See *Telegraph Co. v. Reynolds*, 77 Va. 178; s. c., 5 Am. & Eng. Corp. Cas. 182.

SOUTHERN KANSAS R. Co.

v.

HINSDALE.

(Kansas Supreme Court. February 11, 1888.)

Passenger—Freight Trains—Ticket Regulations.—A railway company has the power to make and enforce a rule or regulation requiring persons desiring to ride upon its freight trains to provide themselves with tickets; but in all such cases the company must furnish convenient facilities to the public for the purchase of tickets, by keeping open the ticket office a reasonable time in advance of the hour fixed by its time-table for the departure of the trains.

Same—Notice—Failure to Procure Ticket—Ejection.—If the conductor or brakeman of a freight train repairs to the caboose of the train after all the passengers are aboard, and announces loud enough for all the passengers to hear, that it is necessary for all persons who desire to ride upon the train to procure tickets before the train starts, and ample time and opportunity is given thereafter for persons to procure tickets, then sufficient publicity is given to the passengers upon the train of the rule of the company, and the right of expulsion for non-compliance with this regulation by a person may be exercised, after leaving the station, at any suitable place.

Same—Ejection.—Where a person takes passage upon a freight train of a railway company without first procuring a ticket, as required by a rule of the company, to entitle him to ride upon that kind of a train, and the conductor has no right to accept any fare or money, the conductor may require such person to leave the train. In such a case, after the train is stopped, and the person is notified by the conductor to get off, he should leave.

Same—Ejection—Abusive Language.—Where a conductor in ejecting a person from a railroad train uses insulting or abusive language in ejecting him, such party may recover damages therefore on account of the injury to his feelings; but he cannot, in an action for damages for his expulsion, also recover damages because the words used by the conductor tended to bring him into ignominy or disgrace.

ERROR to District Court, Allen County; L. STILLWELL, Judge.

This case was tried to a jury at the January term, 1886, of the district court of Allen county. There was a verdict and judgment for the defendant in error for \$525. Special questions of fact were submitted to the jury, and answers returned, as follows: "*Question 1.* Did the defendant, at the time of the injuries complained of in plaintiff's petition, have any

regulations for the government and management of its freight trains whereby passengers could not be carried upon such trains without tickets, passes, or stock contracts? *Answer.* Not to knowledge of plaintiff. (2) Did the brakeman in charge upon the train from which the plaintiff was removed inform the plaintiff, before the train left the depot at Iola, that a ticket would be necessary before any one could ride upon that train? *A.* No. (3) Did the conductor, T. J. Brown, announce in the presence and hearing of the plaintiff, and before the train left Iola, and in a manner loud enough and distinct enough for the plaintiff to have understood him, that it was necessary to have tickets before passengers could ride upon that train, or other words to that effect? *A.* No. (4) Did the plaintiff do anything to ascertain what regulations, if any, existed for the carrying of passengers upon the freight trains of the defendant? *A.* No. (5) If you should answer the last above question in the affirmative, then state what he did in that respect? *A.* — (6) Was the plaintiff informed by any person, before the train left the station at Iola, that the defendant required persons who rode upon its freight train to have tickets therefor? *A.* No. (7) Would the plaintiff by the use of ordinary care and caution have known, before the train left the depot at Iola, that the regulations and rules of the defendant required that passengers should not be carried upon freight trains without tickets, passes, or stock contracts? *A.* No. (8) Did the plaintiff so conceal himself upon the train that the conductor did not discover him until within a few rods of the place where he was removed from the train? *A.* No. (9) What, if any, was the real object of the plaintiff in getting on top of the caboose of the train from which he was removed? *A.* Nothing. (10) What distance did the plaintiff ride before he was removed from the train? *A.* One and three-fourths ($1\frac{3}{4}$) miles. (11) Did the plaintiff consent to the use of all of the force that was employed by the conductor in removing him from the train? *A.* No. (12) Did the conductor, T. J. Brown, attempt to remove, or offer to remove, the plaintiff from the train until after the plaintiff had invited him to take hold of him, and put him off the train? *A.* Yes. (13) Was the removal of the plaintiff from the train accompanied by the use of any abusive, profane, or scurrilous language on the part of the conductor, T. J. Brown? *A.* Yes. (14) If you should answer the preceding question in the affirmative, then state fully what the language used by said Brown was? *A.* Beat and bummer. (15) Did the conductor use any more force than was necessary to remove the plaintiff from the train? *A.* No. (16) Did the conductor, in removing the plaintiff from the train, exercise any force against the plaintiff

that was prompted by malice, hatred, passion, or any other improper motive or feeling? *A.* To some extent. (17) Were the plaintiff's feelings wounded or injured by any words used by the conductor, T. J. Brown? *A.* Yes. (18) If you should answer the foregoing question in the affirmative, state the words that wounded or injured his feelings, and the amount of general damages you award the plaintiff by reason of the use of the words. *A.* Bummer and beat. . . . \$400.00. (19) Did any of the words spoken by the conductor towards the plaintiff, at the time of the injury complained of, tend to bring the plaintiff into ignominy or disgrace? *A.* Yes. (20) If you should answer the foregoing question in the affirmative, then state the words that were spoken, and the amount of general damages you award the plaintiff on account thereof. *A.* . . . Bummer and beat. . . . \$125.00. (21) Did the conductor, by any act of his own, injure the plaintiff? *A.* Yes. (22) If you should answer the foregoing question in the affirmative, then describe the act that injured the plaintiff. *A.* Skinned his leg, and sprained his ankle. (23) Was the plaintiff injured in his person at the time of the removal of himself by the conductor from the train? *A.* Yes. (24) If you should answer the foregoing question in the affirmative, then state whether such injury was the result of any act of T. J. Brown, or the result of his own carelessness or negligence, or the result of accident alone. *A.* Act of T. J. Brown. (25) What were the general damages done to the person of the plaintiff, at the time of the injuries complained of in his petition, that resulted from any act of the conductor, T. J. Brown? *A.* Mental and physical. (26) What, if any, were the general damages done to the feelings of the plaintiff by reason of any suffering that was the result of any physical injuries received at the time of the injuries complained of, and that was the result of any act of T. J. Brown? *A.* Mental and physical. (27) Where was the plaintiff when the conductor took up the passes of the other passengers? *A.* On the caboose. (28) Where was the plaintiff when the train stopped north of Iola? *A.* In the caboose. (29) How far did the train go after leaving the depot before it stopped at the place where plaintiff was removed from it? *A.* One and three-fourths ($1\frac{3}{4}$) miles. (30) How long did the train remain at the place where it stopped before the plaintiff was removed from it? *A.* Twenty minutes."

Geo. R. Peck, A. A. Hurd, and A. B. Clark, for plaintiff in error.

Knight & Foust for defendant in error.

HORTON, C.J.—A. M. Hinsdale brought his action against the Southern Kansas R. Co. to recover damages for being

wrongfully ejected from a freight train. On March 27, 1885, being in the city of Fort Scott, and having business Facts. to transact that day at Garnett, as a special agent of the Orient Insurance Co., he went over the Fort Scott road in the morning to Iola, and then proceeded to the depot of the Southern Kansas road, where he got aboard the caboose about 3:30 o'clock in the afternoon, intending to go to Garnett. He had with him his overcoat and valise. He deposited his overcoat and valise in a seat in the caboose, and took a seat near the stove, where he remained a few minutes; then, with another passenger, went up into the cupola of the caboose, and stayed until after the brakeman came on the train; and after the train had started, and had gone about a quarter of a mile, he suggested to the party with him in the cupola that they go outside, and both of them did, but, as it was windy, the party with him went back into the caboose in a few minutes. Soon after, it commenced to rain, and he turned to go down into the caboose, when the conductor put his head out of the window, and asked him for his ticket. He handed the conductor a silver dollar, but the conductor told him he could not carry him without a ticket, and refused to accept the money. The conductor then told him he must get off, and stopped the train. The train remained standing for Hinsdale to get off 25 minutes. Hinsdale told him he did not "get on to get off between stations," and said "he would not get off until he was put off." The conductor then put him off at the place where he had stopped the train,—a distance of one and three-quarter miles from the depot at Iola,—but in removing him from the train did not use any more force than was necessary. Upon the trial, a verdict and judgment was rendered for Hinsdale for \$525.

This is another one of the class of cases in which the real struggle is with the findings of fact as returned by the jury. Some of the answers to the special questions submitted are not only against the current of testimony, but the entire evidence. Other questions are not frank, but evasive, and several are not responsive to the questions asked. *Railway Co. v. Fray*, 31 Kan. 739; s. c., 15 Am. & Eng. R. R. Cas. 158. The jury specially found that Hinsdale did not do anything to ascertain what regulations, if any, existed for the carrying of passengers upon the freight trains of the railway company. The evidence shows that the com-
Regulations as to tickets—
Passengers on freight trains.
pany had a rule or regulation forbidding the conductors of its freight trains to carry on such trains any passenger who had not a ticket, a pass, or a stock contract. It is the duty of a passenger to inform himself of the regulations governing the transit and conduct of the trains,

if such rules are reasonable. If a passenger disregards the regulations adopted by a company as to the purchase of tickets, or the running of trains, by failure upon his part to make any inquiries, and such neglect is not induced by the company's agent, having authority in the matter, the company is not liable therefor. *Railway Co. v. Nuzum*, 2 Cent. Law J. 829; *Railway Co. v. Nuzum*, 50 Ind. 141; *Beauchamp v. Railroad Co.*, 56 Tex. 239; s. c., 9 Am. & Eng. R. R. Cas. 307; *Henry v. Railroad Co.*, 76 Mo. 288; *Railroad Co. v. Swarthout*, 67 Ind. 567; *Cheney v. Railroad Co.*, 11 Metc. 121; *Railroad Co. v. Bartram*, 11 Ohio St. 457; *Johnson v. Railroad Co.*, 46 N. H. 213; *Dietrich v. Railroad Co.*, 71 Pa. St. 433; *Railway Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10; *Britton v. Railway Co.*, 88 N. C. 536; s. c., 18 Am. & Eng. R. R. Cas. 391; *Railroad Co. v. Randolph*, 53 Ill. 511; *Railroad Co. v. Hatton*, 60 Ind. 12. A railway company has the clear right to make a rule that no one shall be carried as a passenger on its freight trains without tickets, passes, or stock contracts; but in all such cases the company must furnish convenient facilities to the public for the purchase of tickets, by keeping open the ticket office a reasonable time in advance of the hour fixed by its time-table for the departure of the trains. *Railroad Co. v. Rose* (Neb.), 1 Am. & Eng. R.

R. Cas. 253; s. c., 8 N. W. Rep. 433; *Railroad Co. v. Nelson*, 59 Ill. 110; *Railroad Co. v. Bartram*, 11 Ohio St. 457; *Thomp. Carr.* 377. In this case, the ticket office was open, and the agent at the depot was selling tickets for the train. Hinsdale had ample time and opportunity, before the train started upon which he attempted to take passage, to have ascertained that it was necessary for him to purchase a ticket in order to ride. The conductor testified that after Hinsdale got upon the train, and before it started, he went into the caboose, and asked "if all the gentlemen had tickets." There was one person in the car who said that "he did not have any ticket," and the conductor then "told him it was a necessary article to have to ride upon the train." After that the train remained at the station for 20 to 30 minutes. The party who said he was without a ticket subsequently went and got a ticket, and rode upon the train. One of the brakemen testified that Hinsdale and another passenger were up in the cupola of the caboose before the train started, and that he said, loud enough for them to hear, "All must have tickets to ride upon this train." This was also corroborated by the evidence of another employee. Upon this matter Hinsdale testified: "*Question.* Didn't you hear the brakeman make a statement that no passenger could ride upon that train without first getting a

Ejection for
failure to pro-
cure ticket.

ticket, or in substance? *Answer.* I don't know that I did. *Q.* Do you know that you did not? *A.* I have no knowledge. *Q.* Do you swear you did not? *A.* I did not, to the best of my knowledge and belief. *Q.* You don't pretend to say that he did not say it? *A.* I do not. *Q.* And in your presence? *A.* Possibly he might have done so. *Q.* And within three feet of where you stood? *A.* I wouldn't hear all he said. . . . *Q.* Do you pretend to deny that the conductor informed the passengers present that they must procure tickets? *A.* No, sir; I don't deny that, but I did not hear him. *Q.* Did you hear any remark about tickets at all? *A.* I am satisfied I heard no remark about tickets. If I did it entirely slipped my memory." The jury specially found that Hinsdale had no knowledge that it was necessary for passengers to have tickets to be carried upon freight trains. If Hinsdale was prevented from hearing the announcements of the conductor and brakeman on account of being in the cupola of the caboose,—a place intended only for train-men,—then his want of knowledge was the result of his own fault or conduct. If the conductor, or brake-
Same—passenger's failure to hear announcement.
man, or both, went into the caboose after all the passengers were aboard, and announced, loud enough for all the passengers to hear, that it was necessary for all persons who desired to ride upon that train to procure tickets before it started, and in ample time for all wishing to ride to procure tickets, then sufficient publicity was given to the rule of the company, and, reasonable facilities having been afforded for compliance therewith, any passenger neglecting so to do, might be ejected from the car in a proper place and manner. In the absence of a statute regulating this matter, there is no requirement at common law to eject any person who shall fail to comply with such a reasonable regulation at one place rather than another. The convenience of the party is not to be consulted, but the law never permits one to wantonly expose another to injury; therefore no one should be ejected while the car is in motion, so as to endanger his life, limb, or person. Several witnesses testified that they did not hear the announcements of either the conductor or brakeman concerning the necessity for the purchase of tickets. Such evidence, being of a negative character, is not estimated so highly as testimony of one who swears positively that a statement was made, or something done. *Railroad Co. v. Lane*, 33 Kan. 702; s. c., 23 Am. & Eng. R. R. Cas. 237. In any event, if the failure to hear the announcements on the part of Hinsdale was his own fault, either on account of being in the cupola, or engaged in telling a story to a fellow-passenger, the company was not negligent in giving pub-

licity to its regulations concerning the purchase of tickets for that train, and this view of the case seems to have been wholly disregarded by the jury in their findings.

The jury found specially that the plaintiff, in the use of ordinary care and caution, could not have ascertained that he was required to purchase a ticket before being carried upon a freight train. This finding is without any evidence for its support, and is also against the positive evidence of the conductor and brakeman. If Hinsdale had applied at the company's office for tickets and found it closed, or if he had made inquiries of the conductor or brakeman and got no answer, or if he had been induced by the ticket agent or conductor to take the train without the purchase of a ticket, he would have been excusable for being upon the train without a ticket. None of these things occurred.

After the train stopped, and he was notified by the conductor to leave, he should have submitted for the time being. The fact that he caused himself to be ejected from the car can add nothing to his cause of action. A party will be entitled to as much damage for any wrong or injury quietly endured, as if he violently resisted. *Railroad Co. v. Griffin*, 68 Ill. 499; *Railroad Co. v. Cornell*, 112 Ill. 295; see also *Railroad Co. v. Rice*, 38 Kan. 398 [just decided]. Where a party upon a train is explicitly informed by the conductor that he cannot retain his seat, and must leave the car, he then knows that he cannot proceed longer upon the train, but must leave, and resort to his legal remedy, the same as though he had been ejected. "If, after this notice, he waits for application of force to remove him, he does so in his own wrong. He invites the use of the force necessary to remove him, and, if no more is applied than is necessary to remove him, he can neither recover against the conductor nor company therefor. This is the rule deducible from the analogies of the law." *Townsend v. Railroad Co.*, 56 N. Y. 295; *Hall v. Railroad Co.*, 15 Fed. Rep. 57.

It is contended on the part of Hinsdale that he was properly in the caboose without a ticket, because the railway company had not published in the station-house or caboose the regulation requiring passengers to provide themselves with tickets before entering the car of a freight train; and also, that it was usual for the company to carry passengers on its freight trains without tickets, notwithstanding the existence of the rule to the contrary. If the railway company gave the actual notice of the regulation in the caboose, as testified to by the conductor and brakeman, then actual notice was brought

Passenger compelling the use of force in his expulsion.

Publication of regulation—
Violation of rule.

home to the passengers before the train left the station; and the alleged excuses for Hinsdale continuing on the train without a ticket will not avail. If Hinsdale had used this train often, before and after the adoption of the rule as to the purchase of tickets before entering the caboose of a freight train, without objection for want of a ticket, then, of course he would be excusable for not having provided himself with a ticket, if no announcement was made by the conductor or brakeman, as testified to. *Railway Co. v. Greenwood*, 79 Pa. St. 373. But a single instance of fare having been accepted by a conductor, in violation of this rule, would not justify a person in disregarding the same, if previous notice thereof had been given by posters in the station-house.

Four hundred dollars of the judgment seems to have been given for the use of the words "bummer" and "beat" by the conductor, as damages for injury to Hinsdale's feelings; and \$125 for injury for the use of the words "bummer" and "beat" by the conductor to Hinsdale, on account of bringing him into ignomy and disgrace. This is not an action for slander or libel; and the jury have attempted to double the damages for the use of the words "bummer" and "beat." Even if Hinsdale was rightfully expelled from the train, the conductor had no right to treat him in a malicious or insulting manner: but if it be admitted that the conductor used the language alleged by Hinsdale, while he might recover on account of the words for injury to his feelings, he cannot, in an action of this kind, and upon the pleadings filed in this case, also recover damages because the words tended to bring him into ignomy and disgrace. As we read the record, however, it is very doubtful whether the conductor used any severer language to Hinsdale than that, "If he was not trying to beat his way, and was a gentleman, he would get off."

The judgment of the district court will be reversed, and the cause remanded for a new trial.

All the justices concurring.

Passengers—Right to Travel on Freight Trains.—See, generally, *McGee v. Missouri Pac. R. Co.*, and note, 31 Am. & Eng. R. R. Cas. 1-6.

Railroad companies are under no obligation to carry passengers on freight trains, and need not do so except they see fit. *Pfister v. Central Pac. R. Co.*, 70 Cal. 169; s. c., 27 Am. & Eng. R. R. Cas. 246; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510; s. c., 5 Am. Rep. 60, 63; *Dunn v. Grand Trunk R. Co.*, 58 Mo. 187; s. c., 4 Am. Rep. 267; *Burlington & M. R. Co. v. Rose*, 11 Neb. 117; s. c., 1 Am. & Eng. R. R. Cas. 253; *Cleveland C. & C. R. Co. v. Bartram*, 11 Ohio St. 457, 464; *Houston & T. Cent. R. Co. v. Moore*, 49 Tex. 31. But companies in the custom of carrying passengers on freight trains and holding themselves out as ready to do so, become common carriers of passengers upon such trains and must carry

any person desiring to travel thereby. *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Mobile & O. R. Co. v. McArthur*, 43 Miss. 180; *Hazard v. Chicago, B. & O. R. Co.*, 1 Biss. C. C. 503. The company may, however, by regulation allowing only passengers having round-trip tickets, thousand-mile tickets, or passes to travel on freight trains limit the right. *Falkner v. Ohio & M. R. Co.*, 55 Ind. 369.

Procuring Tickets before Entering.—A regulation that passengers taking freight trains shall procure tickets before entering them is reasonable, and a person failing to comply therewith will not acquire the rights of a passenger. *Evans v. Memphis & C. R. Co.*, 56 Ala. 246; s. c., 18 Am. Ry. Rep. 350; *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *Toledo, P. & W. R. Co. v. Patterson*, 63 Ill. 304; *Illinois Cent. R. Co. v. Nelson*, 59 Ill. 110; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *St. Louis, A. & C. R. Co. v. Myrtle*, 51 Ind. 566; *Law v. Illinois Cent. R. Co.*, 32 Iowa 534; s. c., 10 Am. Ry. Rep. 66; *Brown v. Kansas City, F. S. & G. R. Co. (Kan.)*, 16 Pac. Rep. 942; *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523; *Burlington & M. R. Co. v. Rose*, 11 Neb. 117; s. c., 1 Am. & Eng. R. R. Cas. 253; *Cleveland C. & C. R. Co. v. Bartram*, 11 Ohio St. 457; *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. St. 373; *Lane v. East Tennessee, W. & G. R. Co.*, 5 Lea (Tenn.), 124; s. c., 2 Am. & Eng. R. R. Cas. 278.

Notice of Change.—A company hitherto carrying passengers on freight trains and accepting payment of the fare thereon, must give notice of a change requiring the procuring of tickets before entering, and the mere posting of a notice of the regulation at the station-houses is not sufficient. *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. St. 373. See also *Burlington & M. R. Co. v. Rose*, 11 Neb. 117; s. c., 1 Am. & Eng. R. R. Cas. 253; *Lane v. East Tennessee, V. & G. R. Co.*, 5 Lea (Tenn.), 124; s. c., 2 Am. & Eng. R. R. Cas. 278.

Reasonable Opportunity to Obtain Ticket.—But if railroad companies hold themselves out to the public as carrying passengers on freight trains, even on such condition, they must give intending passengers a reasonable opportunity to obtain tickets. *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566; *Brown v. Kansas City, F. S. & G. R. Co. (Kan.)*, 16 Pac. Rep. 942. When a passenger desiring to take passage upon a freight train endeavors to procure a ticket, but, by reason of the ticket office being closed he is unable to do so, he has the right to travel on such train by paying, or offering to pay, the usual fare. *Brown v. Kansas City, F. S. & G. R. Co. (Kan.)*, 16 Pac. Rep. 942. An opportunity to obtain tickets at such a time as suits passenger trains only, is not a reasonable opportunity within this rule. *Evans v. Memphis & C. R. Co.*, 56 Ala. 246.

Sufficiency of Effort to Procure Ticket.—A passenger desiring to travel upon a freight train does not make a sufficient effort to obtain a ticket, if he simply goes to the window of the ticket office and not finding the agent there, immediately enters the cars, without making any effort to see if the agent was within the office and without making any attempt to attract his notice. *Indianapolis & St. L. R. Co. v. Kennedy*, 77 Ind. 507; s. c., 3 Am. & Eng. R. R. Cas. 467.

Evidence of Non-enforcement of Rule.—In an action to recover damages for having been put off a train the railroad company claimed that it was not liable, by reason of the failure of the plaintiff to procure a ticket in conformity with its rules, which required passengers to procure tickets before entering freight trains. Plaintiff, for the purpose of showing that the defendant's freight trains carried passengers for hire, and that no rule was enforced by the defendant requiring the purchase of tickets before

entering its trains, offered to prove by four witnesses that said witnesses had on a number of occasions taken passage on defendant's freight trains without first procuring tickets, and that they paid their fares to the conductors of said trains; which testimony, on the objection of the defendant, was excluded. *Held*, that the testimony was competent, and its exclusion error. *Brown v. Kansas City, F. S. & G. R. Co.* (Kan.), 16 Pac. Rep. 942. In this case the court say: "Plaintiff also contends that the court erred in excluding the evidence of some four witnesses tending to show that this rule of the company was not enforced on its freight trains. This evidence was competent for two purposes: First, to show that freight trains on defendant's road carried passengers for hire; second, to show that no rule was in force requiring the purchase of tickets before entering the train. True, this evidence might not be sufficient to establish the custom when the evidence was given; but, if not, then it was the province of the court to so instruct the jury, and inform them what evidence it would require to show such custom and disregard of the rules in question. *Stoner v. Pennsylvania Co.*, 98 Pa. St. 388; *Lucas v. Railway Co.*, 33 Wis. 54; *Smith v. Miller*, 52 N. Y. 549; *Railroad Co. v. Wheeler*, 35 Kan. 185."

STATE

v.

HUNGERFORD.

(*Minnesota Supreme Court. June 18, 1888.*)

Passengers—Fares—Discrimination—Tickets.—A railroad company may charge more as fare to those paying on the train than it charges for tickets purchased before entering the train. Following *Du Laurans v. Railroad Co.*, 15 Minn. 49.

Same—Procuring Ticket—Reasonable Opportunity.—The condition attached to such right to discriminate, that the company shall give to persons desiring to travel on one of its trains a reasonable opportunity to purchase tickets, does not require it to keep its ticket office open within such time, before the departure of the train, that a person cannot procure a ticket and get upon the train before it begins to move. Evidence *held* not to sustain the verdict.

APPEAL from District Court, Scott County.

Prosecution of Harvey Hungerford, a conductor, for an assault upon a passenger on the Minneapolis & St. Louis Railway. The defendant convicted, and appeals.

H. J. Peck for appellant.

Moses E. Clapp, atty. gen., for respondent.

GILFILLAN, C.J.—Prosecution for an assault. The alleged assault consisted in the defendant, who was conductor of a passenger train on the Minneapolis & St. Louis Railway taking
 Facts. hold of Nicollin, the complaining witness, who was a passenger on the train, for the purpose of putting him off because he refused to pay the fare demanded by the defendant. That a conductor may, using only the force reasonably necessary (and no excess is claimed in this case), remove from the cars a passenger who refuses to pay the proper fare when demanded by the conductor, is beyond question. The fare on this railroad, from Jordan to Carver, to make which journey Nicollin had got upon the train, was, when paid on the train, 33 cents, but a regulation of the company made in all cases a deduction of 10 cents, from what we may call the train rates of fare, to passengers purchasing tickets at the station, before entering the cars. Nicollin had not purchased a ticket. The defendant demanded of him 33 cents; he tendered 25 cents, and refused to pay any more; whereupon defendant took hold of him to put him off. So the case turns on the defendant's right to require the payment of 33 cents fare. That a railroad company may charge more to passengers who pay their fare on the train than it does for tickets purchased before entering the train (the difference, of course, being a reasonable one, and no one could say that in this case it was unreasonable) was affirmed by this court in the case of *Du Laurans v. Railroad Co.*, 15 Minn. 49 (Gil. 29). To the right of the company to make that discrimination is, however, attached this condition: that it give to persons desiring to travel on its road a reasonable opportunity to purchase tickets, which includes the having a reasonably convenient place for the sale of tickets, and a person there to sell them for such reasonable time previous to the departure of the train as to enable persons to procure tickets, and enter the train, before it starts. Ordinarily, the question whether the time thus given for the purchase of tickets is reasonable, is for the jury. The jury in this case must have found that reasonable time was not given; and upon that point the evidence does not justify the verdict. The testimony of Nicollin (and no other testimony on the point differs from it) is to this effect: The train was due at 4 minutes to 6 P.M. He was at the station at about half past five P.M., when the ticket office was open, the ticket agent there, and he had an opportunity to buy the ticket. He asked the agent if the train was on time, and was told it was not. He then went home to supper, from a quarter to a half a mile distant, when he heard the train whistle. The

Additional
 charge when
 passenger is
 without ticket.

train was from 25 to 35 minutes late. He sprang into an omnibus, hurried to the station; arriving there, ran to the ticket office, called for a ticket; the agent not being in, came out, found the train started, and got on the train when it was moving; doing all this as hurriedly as he could. From the evidence no one could say that, after his arrival in the omnibus, he had a reasonable time in which to go to the ticket office, procure a ticket, and reach the train in time to get on before it began to move. The requirement of a reasonable opportunity to purchase tickets does not make it the company's duty to keep the ticket office open within such time, before the departure of a train, that persons purchasing tickets cannot get on the train before it begins to move. Railroad companies ought not to sell tickets within that time. As a matter of public policy, no one except those operating it ought to be permitted to get upon a railroad train when it is in motion. Order reversed.

Same—Reasonable opportunity to procure ticket.

Tickets for Passenger Trains—Regulations.—A regulation that passengers who fail to procure tickets before entering the train, must pay a higher fare, is reasonable and will be enforced; *Crocker v. New London, W. & P. R. Co.*, 24 Conn. 249; *St. Louis, A. etc., R. Co. v. South*, 43 Ill. 176; *Indianapolis & St. L. R. Co. v. Kennedy*, 77 Ind. 507; s. c., 3 Am. & Eng. R. R. Cas. 467; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; s. c., 28 Ind. 1; *State v. Chovin*, 7 Iowa, 204; *Wilsey v. Louisville & N. R. Co.*, 83 Ky. 511; s. c., 26 Am. & Eng. R. R. Cas. 258; *State v. Goold*, 53 Md. 279; *Du Laurans v. St. Paul & P. R. Co.*, 15 Minn. 49; *Hilliard v. Goold*, 34 N. H. 230; *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.), 579; *Cincinnati, L. & C. R. Co. v. Skillman*, 39 Ohio St. 444; s. c., 13 Am. & Eng. R. R. Cas. 31; *Poole v. Northern Pac. R. Co.*, (Oreg.), 18 Pac. Rep. 107; *Lane v. East Tennessee, V. & G. R. Co.*, 13 Lea (Tenn.), 547; s. c., 2 Am. & Eng. R. R. Cas. 278; *Stephen v. Smith*, 29 Vt. 160; *People v. Jillson*, 3 Park Cr. Cas. 234. But a reasonable opportunity to procure tickets must be given, otherwise passengers have a right to be carried on payment or tender on the cars, of the ticket rate. *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Chicago, B. & G. R. Co. v. Parks*, 18 Ill. 460; *Indianapolis R. Co. v. Rinard*, 46 Ind. 293; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; s. c., 28 Ind. 1; *Wilsey v. Louisville & N. R. Co.*, 83 Ky. 511; s. c., 26 Am. & Eng. R. R. Cas. 258; *Du Laurans v. St. Paul & P. R. Co.*, 15 Minn. 49; *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505; *Chase v. New York Cent. R. Co.*, 26 N. Y. 523; *Poole v. Northern Pac. R. Co.* (Oreg.), 18 Pac. Rep. 107.

Reasonable Opportunity.—What is a reasonable time for procuring tickets before the departure of a train, depends upon the requirements and convenience of the public at each particular station. *Everett v. Chicago, R. I. & P. R. Co.*, 69 Iowa, 15; s. c., 27 Am. & Eng. R. R. Cas. 98. It is not necessary that the ticket office should be kept open before the departure of the train until the very instant the train moves off. *Everett v. Chicago, R. I. & Pac. R. Co.*, 69 Iowa, 15; s. c., 27 Am. & Eng. R. R. Cas. 98 note, 101; *Swan v. Manchester & L. R. Co.*, 132 Mass. 116; s. c., 6 Am. & Eng. R. R. Cas. 327; 42 Am. Rep. 432. If a company has provided a station at which its passenger trains stop, but at which there is no ticket

office, it has not given a passenger a reasonable opportunity to obtain a ticket. *Poole v. Northern Pac. R. Co. (Oreg.)*, 18 Pac. Rep. 107.

Ejection for Refusal to Pay Full Fare.—If, in consequence of the fractious refusal of a passenger to pay the full fare, although he had not provided himself with a ticket, the train is stopped for the sole purpose of ejecting him, he cannot insist on continuing his trip on paying his fare, and may be removed from the train. If, however, the train stops at a regular stopping place, and the passenger before being ejected offers to pay the full fare, the conductor must accept it, and the ejection of the passenger thereafter will be wrongful. *O'Brien v. New York Cent. & H. R. R. Co.*, 30 N. Y. 236; s. c., 1 Am. & Eng. R. R. Cas. 259. When a passenger has wrongfully neglected to obtain a ticket, and on refusing to pay the increased fare is ejected at a station, he cannot at that station purchase a ticket for the rest of the journey, and resume it upon the same train. *Swan v. Manchester & L. R. Co.*, 132 Mass. 116; s. c., 6 Am. & Eng. R. R. Cas. 327; 42 Am. Rep. 432. A conductor to whom the ticket fare has been handed by a passenger who has failed to obtain a ticket, cannot eject the passenger without returning the money received. *Bland v. Southern Pac. R. Co.*, 55 Cal. 570; s. c., 3 Am. & Eng. R. R. Cas. 285.

HOBBS

v.

TEXAS AND PACIFIC R. CO.

(Arkansas Supreme Court. October 15, 1887.)

Passengers—Freight Trains—Rules of Company—Waiver.—The fact that a regulation of a company prohibiting the carrying of passengers upon through freight trains has been violated, and conductors of such trains have been in the habit of carrying passengers, does not deprive the company of the right to enforce the regulation whenever it deems fit, and does not give passengers any right to travel on such trains; and a person who boards a freight train which has no appearance of being held out for the accommodation of passengers, is not legally a passenger and may lawfully be ejected.

Same—Ejection—Statutory Provision—Freight Trains.—The Arkansas statute which requires railroad companies to expel passengers only at stations is confined to cases where passengers refuse to pay the fare, and has no application to the case of a person who is unlawfully upon a freight train.

APPEAL from Circuit Court, Miller County.

Action to recover damages for the alleged wrongful expulsion of plaintiff from defendant's train. The plaintiff appeals from a judgment for the defendant. The opinion states the case.

J. D. Cook for appellant.

Dodge & Johnson for appellee.

COCKRILL, C.J.—It was a published rule of the Texas & Pacific R. Co., that passengers were forbidden to ride on through freight trains. This same rule forbade Facts. conductors from receiving or carrying them on such trains. Hobbs, the appellant, boarded one of the company's through freight trains, as it stood in the company's yard, where it was made up at Texarkana. He was not observed by the conductor until the train had gone six or eight miles on its journey, when the train was stopped in the neighborhood of a way-station, and Hobbs got off at the command of the conductor, after tendering his fare for a ride to his destination. This action was instituted to recover for the ejection. On the trial there was testimony tending to prove that Hobbs and others had been in the habit of riding on the through freight trains on this road, including the one in question, as passengers, without objection from any quarter; and Hobbs requested the court to charge the jury that if they should find that to be the true state of the case, he had the right to presume the regulation against carrying passengers was not in force, and that upon the tender of the usual fare to the conductor he should have been carried to his destination. The court refused these prayers for instructions; there was a verdict for the company; Hobbs appeals, and urges that the court erred in charging the jury otherwise than as requested by him.

The appellant does not contest the right of the company to enforce a regulation against the carriage of passengers on freight trains. As it is a salutary rule for the public as well as the company, the right of the latter to enforce such a regulation must be con- Effect of previous violation of regulation. ceded. *Railway Co. v. Rosenberry*, 45 Ark. 263; *Railroad Co. v. Atchison*, 47 Ark. 79. If the company's freight trains had been habitually carrying passengers in spite of the regulation to the contrary, and the conductor on the occasion in question had accepted fare from Hobbs for his intended ride, the relation of passenger and carrier would doubtless have been established with all the incidents that attend that relation. But the fact that the regulation had been violated, however great the extent of its violation, did not deprive the company of the right to begin the enforcement of it whenever it was deemed fit. Whatever may have been the custom of the company as to carrying passengers on its through freight trains before this time, on the occasion in

question the train had no appearance of being held out for
 Train had no the accommodation of passengers. It had no
 appearance of passenger coach attached, and was not found by
 having accom- Hobbs at a depot or other place where the pres-
 modations for en- ence of passengers could be anticipated. These
 Harrison. facts of themselves were sufficient to bring notice home to
 Hobbs that the train was not intended for his accommodation.
 Where there is a division of the freight and passenger busi-
 ness of a railroad, the common presumption is that a person
 found on a freight train is not legally a passenger; and if he
 claims that he is, it devolves upon him to show a state of case
 that will rebut the presumption. *Eaton v. Railroad Co.*, 57
 N. Y. 382; *Railway Co. v. Moore*, 49 Tex. 47. That was
 not done by Hobbs in this case. He entered the train, under
 the circumstances detailed above, without the knowledge of
 the conductor, and without the consent of an agent of the
 company authorized to grant him the privilege; and having
 thus intruded himself into the train, it was lawful to eject
 him.

It is argued that it was unlawful to eject the appellant at a
 place other than a station. The point at which he was put
 Place of ex- off is shown to be in the State of Texas. In the ab-
 pulsion. sence of a statute restricting the right, the company
 might have put him off lawfully without reference to stations.
Railway Co. v. Branch, 45 Ark. 524. It was not proved what
 the law of Texas is in that respect, but if we could yield to
 the appellant's argument that the presumption is that it is the
 same as our own, he could not profit by it. Our statutory
 restriction upon the company's right to put persons off their
 trains is confined to the single instance of a passenger who
 refuses to pay fare. *Mansf. Dig. § 5474*. Beyond this the
 common-law right is not impaired. The appellant was not
 put off for the non-payment of fare. His ejection was lawful.
 Let the judgment be affirmed.

Passengers Riding on Freight Trains.—See *Southern Kan. R. Co. v. Hinsdale*, and note, *ante*, 256.

VIRGINIA MIDLAND R. Co.

v.

ROACH.

(*Virginia Supreme Court of Appeals.*)

Passengers—Riding on Engine—Former Employee—Notice of Rules.—A person who has been in the employ of a railroad company as a fireman, is charged with notice of rules prohibiting any one but the engineer and certain employees from riding on the engine, which every employee was required to learn, and if he rides upon the engine, even though it be at the invitation of the engineer and conductor, he is a trespasser upon the train, and has no claim against the company for personal injuries sustained by him through the negligence of the company's servants.

ERROR to Circuit Court, Pittsylvania County.

Action of tort to recover damages sustained by the plaintiff while travelling upon the defendant's railroad. Defendant appeals from a judgment refusing to set aside a verdict for the plaintiff and order a new trial. The opinion states the facts.

Kirkpatrick & Blackford for plaintiff in error.

E. E. Boulden for defendant in error.

HINTON, J.—This is an action of tort in which the plaintiff recovered a verdict for \$500, and the sole question we have to decide now is whether the court erred in refusing to set aside that verdict, and to award a new trial in this case. As appears from the record, on the 6th day of March, 1883, E. B. Fortune, the engineer of the train on the narrow-gauge railroad from Elba, in Pittsylvania county, to Rocky Mount, in Franklin county, invited the plaintiff to ride on the engine with him. The plaintiff, Roach, accepted the invitation, and rode about seven or eight miles to Pittsville. Here he got off the engine, and got into the passenger coach attached to the train, and rode some four or five miles to Sandy Level station, where he got off, and intended leaving the train, but the engineer again invited him to ride with him on the engine, and to go as far as Rocky Mount. This invitation the plaintiff accepted, and once more got upon the engine. There he found Payne, the conductor of the train,

Fortune, the engineer, and Reynolds, the fireman. Payne at once opened the throttle-valve, and started the engine forward towards Rocky Mount. It was then between 7 and 8 o'clock, very dark, and raining. As the conductor started the engine, he handed a newspaper to the engineer, calling his attention to a paragraph of a few lines about a negro mason in Texas which amused him. The engineer read it, handed it back to the conductor and then took charge of the engine. A mile and a half beyond Sandy Level the engine and the whole train, consisting of a box or freight car, and a passenger car, ran off the track, the engine and tender on one side, and the rest of the train on the other, and all on board the engine were more or less hurt. Roach, the plaintiff, was scalded on his body and face by hot water from the engine. He was attended by a physician 10 days, and was confined to his room for a month. He paid a doctor's bill of twenty-four dollars, which the company refused to pay for him. There was a conflict of opinion as to the speed at which the train was going. The witnesses for the plaintiff thought it faster than usual, and the only two passengers on the train testified that the motion of the train alarmed them, and they moved their seats away from the stove for fear of an accident. No one except those on the engine was hurt by the accident. The rules of the company prohibit any one but the engineer and certain employees from riding on the engine. They also require every employee to learn them. Roach, the plaintiff, had theretofore served as fireman for four or five months, though for several weeks he had not been in the service of the company, and testified that he was not aware of any such rule when he got on the engine. He did not pay any fare for his ride.

Now, if we treat the certificate in this case as it really is,—as a certificate of evidence, although it purports to be a certificate of facts, and under the long and well-settled rule of this court can consider only the evidence introduced by the party who prevailed below,—it must be conceded that there is evidence of such negligence as would make the company clearly liable in damages to any passenger on the train. But Roach was not a passenger, but a mere trespasser or intruder, because he was not lawfully on the train. It is true, he says that he was invited to ride by the engineer, but no one knew, or, what is the same thing, ought to have known, better than he that neither the engineer nor conductor, nor both, could give him the right to ride upon the engine. He was not only a fireman, but had been an employee of this very road for months, and must be charged with knowledge of what he would have

Plaintiff a
trespasser on
the train.

learned if he had discharged his duty, and read the printed regulations which had been furnished, namely, that neither the engineer nor conductor had authority to invite him to ride in such an exposed position. The conductor, of course, had control of the train, and the right to assign passengers seats; but this, as has been well said, would not authorize him to assign him a seat upon the cow-catcher. On the contrary, his duty to his company requires him to see that its passengers are safely seated, and that all persons not entitled to be carried should be excluded from the train; and it is therefore clear that Roach could not derive any authority to ride from him. But if we look at the evidence of the defendant in error himself it will distinctly appear that the claim of Roach that he was riding at the invitation of the conductor was plainly an after-thought, for he had twice gotten upon the engine, at the invitation of the engineer, before he saw the conductor, and then all the invitation he received from the conductor must be found in the language, "Hello! Where are you going?" and the circumstance that he did not warn him off.

The case before us is clearly distinguishable from the cases where injured passengers recovered damages although, at the time they were hurt, they were not in cars where the passengers usually ride. For in such cases, as the court said in *Robertson v. Railroad Co.*, 22 Barb. 93,—“the injured passengers were lawfully and rightfully upon the trains, and were only guilty of an impropriety in selecting the car or seats in which they rode, whereas,” as we have seen in this case, “the plaintiff never was rightfully upon the train.” As was said by the court in that case, “the plaintiff was a wrong-doer the moment he stepped his foot upon the engine, and so continued until he was injured, and cannot sustain this action.” *Duff v. Railroad Co.*, 91 Pa. St. 458; *Beach*, Contributory Neg. 161, 177-179.

The judgment must be reversed, the verdict be set aside, and the suit of the plaintiff be dismissed.

LEWIS, J. not sitting.

Passengers Riding in Dangerous Place—Consent and Authority of Servants—See *Lake Shore, etc., R. Co. v. Brown*, and note, 31 Am. & Eng. R. R. Cas. 61, 72.

34 A. & E. R. Cas.—18.

ROSENBAUM
v.
ST. PAUL AND DULUTH R. Co.

(*Minnesota Supreme Court. February 8, 1888.*)

Construction Train—Permission to Ride—Grader.—The presumption that one who is permitted by an employee of a railroad company to ride upon a construction train is not lawfully thereon may be overcome by special circumstances implying the authority of such employee to grant such privilege.

Same—Gravel Train—Trespasser.—Plaintiff, a grader in the employment of the defendant, was injured by an accident which occurred while he was riding upon a gravel train. The graders had returned to the camp during the day and were informed that they would not be required to go out again during that day. Plaintiff went upon the gravel train for the purpose of getting his coat which he had left at the place where he worked, and was returning when the accident happened. The company was in the habit of transporting employees on the train daily, and the conductor had consented to plaintiff's riding upon it on the particular occasion. *Held*, that plaintiff was not a mere trespasser upon the train, and that defendant was responsible for defects in the track causing the accident.

Same—Defective Track—Assumption of Risks.—A person riding on such train, and over and upon side tracks, constructed in the ordinary manner, is deemed to consent to and accept risks incident to such a train and a track of that character; but if, through the neglect of the company to keep such track in suitable repair for the ordinary purposes for which it was constructed and used, an injury occurs to one lawfully upon the train, and without fault on his part, he may recover.

APPEAL from District Court, Ramsey County.

Action to recover damages sustained by plaintiff. Defendant appeals from a judgment for the plaintiff. The opinion states the case.

James Smith, Jr., and *O'Brien & O'Brien*, for St. Paul & D. R. Co., appellant.

Propping & Markham, for Rosenbaum, respondent.

VANDEBURGH, J.—1. The presumption of law is that persons riding on construction trains, and not employed in actual service thereon or in connection therewith, are not lawfully there, and, if permitted to be there by the employees of the company, the presumption is against their authority to bind the company. *Waterbury v. Railroad Co.*, 17 Fed. Rep. 673; *Prince v. Railway*

Presumptions
as to riding on
construction
trains.

Co., 64 Tex. 144. But this presumption may be overcome by special circumstances; as where, for instance, the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes. In the case at bar the company was engaged in repairing its track. Separate companies of men were employed about the work. Some were engaged in loading the cars at the gravel pit; others accompanied the cars, and unloaded the gravel along the track; and others were graders, engaged in ballasting the track. The plaintiff belonged to the third class. Facts.

The men so employed were all boarded and lodged at the boarding cars of the defendant stationed on a side track, and they were daily transported on the construction train to and from the boarding place and their work. And there was a side track near the boarding cars about 500 feet long, upon which the construction train, which was made up of flat cars, was run when it came to the boarding car.

The plaintiff was in the habit of being so carried with others daily. On the day in question when the alleged injury occurred, the train brought plaintiff and others engaged in the same work in the middle of the afternoon to the camp, and they were notified that they were not required to go out again to work that afternoon. He had left his coat at the place where he worked, and he thereupon rode back on a train loaded with gravel to get it, in company with the men who were unloading the cars, and with the consent of the conductor in charge of the train, who knew that he was not there to help unload the cars. The train came up to the camp from the south, when plaintiff got on board to go for his coat, and when it came back to the camp for the day with plaintiff and other employees it was run over the side track where the accident complained of occurred.

Under these circumstances, we do not think that the plaintiff ought to be considered a trespasser on the train, or that the defendant owed him no duty in respect to the condition of its track. It was the established practice of the company to transport employees, including the plaintiff, on this train every day. He was still an employee, Plaintiff not a trespasser. though not working at that time, and was riding with others engaged in the same general employment. In view of the fact that these employees were all permitted to ride daily, and that the train was under the general direction and management of the conductor, who also had general charge of the work and the men, it should be held to be fairly within his reasonable discretion to allow the plaintiff to ride, under the circumstances of this case. The plaintiff, therefore, having no knowledge of any rule forbidding the conductor to

grant such permission, might presume such authority from the nature of the business, and the manner in which it was conducted. It may be a question whether the instructions of the court in this case were in all respects strictly accurate, but, as no exceptions were taken to the charge, we need not consider such instructions. The defendant's first and second requests were properly refused, because their effect was to take the case from the jury. The court was right in refusing the third and fourth requests, and charging in lieu thereof "that, if the conductor was forbidden to carry passengers upon the train at the time in question, the plaintiff could not recover for the injury, unless the circumstances for which the company was responsible were such as to lead the plaintiff, as a reasonable man, to understand that he had such authority." The question was for the jury, upon the evidence in the case.

2. The negligence complained of was solely in respect to the condition of the side track. The court charged the jury, at the defendant's request, that, if plaintiff knew the manner in which the side track was constructed, he assumed the risk necessarily incident to such construction. **Defective track—Assumption of risk.** In riding on this train, he consented to, and accepted all the usual incidents to such a train. He cannot recover for injuries resulting from the condition of the side track, if the same was constructed in the usual way, though the grade was imperfect or uneven, and the track unballasted. But if through failure to spike the rails, or neglect to keep it in suitable repair for the temporary purposes for which it was constructed, and used, an injury occurred to one lawfully on the train, without fault on his part, he would be entitled to recover. *Shoemaker v. Kingsbury*, 12 Wall. 369; *Hazard v. Railroad Co.*, 1 Biss. 503. The defect complained of by the plaintiff arose chiefly from the fact that the rails were not properly spiked to the ties. The evidence on this question was properly received, and the determination of the trial court thereon must be considered as final. Order affirmed.

Risks Assumed by Servant.—See *Meloy v. Chicago & N. W. R. Co.*, 33 Am. & Eng. R. R. Cas. 358; *Indianapolis, etc., R. Co. v. Watson*, and note, 33 Ib. 334, 346; *Wilson v. Winona and St. P. R. Co.*, and note, 31 Ib. 246.

REARY

v.

LOUISVILLE, NEW ORLEANS AND TEXAS R. CO.

(Louisiana Supreme Court. January 9, 1888.)

Personal Injuries—Trespasser—Permission of Baggage Master.—It is not within the scope of the employment of a baggage master connected with a train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter or ride on a coach of such train; and permission given under such circumstances cannot create the relation of carrier and passenger.

Same—Liability of Company.—The company is not liable to such person for injuries which they may receive, unless for negligence or tortious acts on the part of the company.

Same—Degree of Care—Trespasser.—A railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it.

Same—Panic.—A railway company is not liable to a person, whether passenger or trespasser, who in a state of panic or fear jumps out of a train in motion, and is injured thereby; in the absence of proof that such panic or fear was caused or inspired by word or act of an agent or employee of the company.

APPEAL from Civil District Court, Parish of Orleans.

Suit by H. Reary, for the use of his minor child, against the Louisville, New Orleans & Texas R. Co. to recover damages for personal injuries. Defendant appeals from a judgment for the plaintiff. The opinion states the case.

Farrar and Kruttschnitt for appellant.

Braughn, Buck, Dinkelspiel, and Hart for appellee.

POCHE, J.—Suing for the use of his minor child, plaintiff claims damages in the sum of \$10,000 for personal injuries inflicted on his child by one of defendant's trains through the alleged carelessness and negligence of the company's employees. Defendant appeals from a judgment of \$3,000, based on the verdict of a jury.

The evidence is very conflicting on the salient features of the case, but from our reading of the record we find the following pertinent facts from the preponderance of the testimony: The accident occurred at the company's Facts. depot, which is situated on and occupies the neutral ground

or space included between two streets or thoroughfares known as North and South Poydras streets, in this city, on a train of passenger cars, which had just arrived, had discharged its passengers and their baggage, and was being switched out of the main track, in order to be set at rest on a side track for the night. While plaintiff's daughter, between eight and nine years of age, was playing in and around the depot, with four other girls a little more advanced in years, one of whom was her sister, of about thirteen years of age, the girls took a child's notion to ride on that train, which was under the operation of being switched off, at about 7 o'clock in the evening, in the month of November, 1886. One of the girls asked and obtained permission so to do, of the baggage master of the train, who was standing near by, preparatory to his starting for home. Four of the girls entered one of the passenger coaches, and took seats at the end towards the baggage car, and the fifth child caught on and remained outside on the steps of the coach. As the train was in the act of being moved out of the main track, at a pretty rapid rate, the girls became alarmed at the belief and fear that the train was running out of the city, and going, as several of them say, "out to Baton Rouge," whereupon they ran out of the coach, and precipitately jumped out of the car. It was in that flight that plaintiff's youngest daughter fell, and that her foot was seriously injured by being run over by one of the wheels of the coach.

Under that condition of things the defendant makes the point that the baggage master had no authority, within the scope of his employment, to grant the request of the children for permission to ride on the train, so as to render the company liable for injuries resulting from such permission. The record shows that the train was not under the charge or control of that employee, but that it was under the responsibility of another and entirely different person, who had no knowledge of the presence of the girls on that train. The record is conclusive on that point, and the authorities are equally clear on the law. The baggage master has no duty or authority with the train, whether running or at the depot; and his permission to the girls to ride on that train cannot bind or affect the rights or obligations of the company. *Pierce*, R. R. 277; *Snyder v. Railroad Co.*, 60 Mo. 413; *Gillet v. Railroad Co.*, 55 Mo. 315; *Hanson v. Railway Co.*, 38 La. Ann. 111.

It is in proof that rigorous orders had been given by the management of the company to drive away children who came to play in and around their depot; and, to the knowledge of the girls, many children had been ordered away. It

Permission
given by bag-
gage master—
Effect.

is thus made clear that the permission given by the baggage master was unauthorized under the scope of his employment, and in direct violation of the company's rules and regulations. It is also in proof, beyond a doubt, and it is not disputed by plaintiff, that the train was not in use or motion, at the time of the accident, to carry passengers under its purpose as a common carrier, but that it was being pulled back and forth, merely and exclusively with the intention of removing the coaches from the track on which they had entered the depot, and of preparing them for the formation of another train for use in the company's business on the next day. Hence it clearly follows that the relations of carrier and passenger did not arise between the defendant and plaintiff's child.

Relation of
carrier and
passenger did
not arise.

Now, in one of the cases very strenuously relied on by plaintiff, the case of *Railroad Co. v. Stout*, 17 Wall. 657, the supreme court of the United States laid down the following pertinent rule: "That while a railway company is not bound to the same degree of care in regard to mere strangers, who are unlawfully upon its premises, that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers arising from its negligence or from its tortious acts." The rule is not only supported by authority, but it finds its sanction in principles of reason, common sense, and natural justice. It is, in fact, a universal rule on the subject of the responsibility of common carriers. But, under the circumstances of this case, we feel warranted to extend the scope of the rule still further, and to hold the defendant company to the same degree of care towards the children who were in that coach that it would owe to passengers being conveyed by it on a journey, after payment of their fare.

Liability of
company to
strangers.

Our reading of the record has entirely failed to disclose any act of negligence, or dereliction of any duty, on the part of the company, which it owed to those girls, even if they had been regular passengers on a journey over its road. An attempt has been made to show that the panic among the girls, and their precipitate flight from the coach, were caused by the act of one of the company's employees, who suddenly, and without warning, blew out the lights in the car; and his act is qualified as reckless and mischievous. But that contention finds no support in the record. In their testimony two of the girls stated that they did not notice whether there were any lights on the coach or not; and not one of them is certain of having seen any person or persons put out the lights. We are entirely satisfied, from the evidence, that the panic among the

Negligence of
company—
Panic among
girls.

girls was caused by the fear that they might have made a mistake, and had entered a train which was going to Baton Rouge. Hence, impelled by that fear, they attempted to jump out while the train was in motion. Now, supposing that any passenger on a regular train should labor under a similar mistake, in believing, for instance, that the train was passing by the station to which he was destined, and, fearing that he might be carried beyond the same, should jump out as the train was pulling out of the station, and be injured by falling, could the company be held liable for injuries thus received? Evidently not. In that case, as in this, there would be no ground to conclude that the company had been guilty of any negligence towards the passenger on its train.

Where is the duty which the defendant corporation owed to plaintiff's child, and which it did not discharge or perform? By remaining on the coach until it had been switched off on the side track, she would have been perfectly safe, and could have stepped out, as she and her companions had evidently intended to, and as they knew they could do without the slightest danger. Who is responsible for the ungrounded fear of the girls that the train was being run out of the city, or perhaps to Baton Rouge, and which is beyond a doubt the proximate cause of the accident? They were alone in a coach where they had entered voluntarily with the childish intention of taking a ride while the train was being switched off. They say themselves that after they had taken their seats in the coach the baggage master moved from the platform in front of them and entered the baggage car, where his duty called him. There is no pretense that a single word was spoken to them after they had taken their seats in the coach, by any officer, servant, or other employee of the company, or that they were ordered off the train by any one. In running out and jumping, they were impelled by motives with which the company had not the remotest connection or agency. And in that feature the circumstances of the case are much more favorable to the company than in any of the reported cases on which her counsel rely in their brief. *Cauley's Case*, 95 Pa. St. 398, and 98 Pa. St. 490; *Duff v. Railroad*, 91 Pa. St. 458. Under our views of the case, and from our solution of the pertinent facts flowing from the weight of evidence, we hold that the pivotal question does not hinge on the contributory negligence of the passenger, but exclusively on the entire absence of negligence of the company. *Flower v. Railroad Co.*, 69 Pa. St. 210.

Absence of negligence on the part of the company.

Our opinion is that the verdict of the jury is manifestly erroneous, and that in justice it must be set aside. It is there-

fore ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment of the district court annulled, avoided, and reversed; and it is further ordered that plaintiff's demand be rejected, and his action dismissed, at his costs in both courts.

Jumping from Moving Train by Person in Fear.—See *Chicago, etc. R. Co. v. Felton*, 33 Am. & Eng. R. R. Cas. 533, note, 539.

KANSAS CITY, FORT SCOTT AND GULF R. CO.

v.

KELLEY, by his Next Friend.

(*Kansas Supreme Court. June 11, 1887.*)

Personal Injuries—Trespasser on Train—Ejection.—If a boy 15 years old who is upon a freight train wrongfully, and as a trespasser, for the purpose of riding without paying his fare, is commanded by the brakeman to jump off the train while in dangerous motion, in the night-time, and in obedience to that command, and in fear of being thrown off, jumps off the train, and is run over and injured, the company is liable.

Same—Authority of Brakeman.—It is within the scope of the general authority of a brakeman on a freight train to prevent trespassers from getting on the train, and to remove such persons who wrongfully get thereon; but if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the railroad company is liable.

ERROR to District Court, Johnson County.

Action by William Kelley, by his next friend, Giles Milhoan, against the Kansas, Fort Scott & Gulf R. Co., to recover damages for personal injuries caused by the act of the defendant's brakeman in ejecting plaintiff, while the train was in motion. Defendant brings error to review verdict and judgment for the plaintiff for \$4,000.

Wallace Pratt and Blair & Perry for plaintiff in error.

A. Smith Devenney for defendant in error.

CLOGSTON, C.—It appears from the evidence that on the night of the sixteenth of June, 1884, while the north-bound freight train on the defendant's railroad stopped for water south of the city of Olathe about one mile, William Kelley

got on the freight train, between two freight cars, for the purpose of going to Kansas City; that he had no ticket, and no money to pay his fare; that he had been working in Galena, Cherokee county, Kansas, and had been sick, and was beating his way home to Kansas City on the railroad. When the train started, and before it reached the station at Olathe, a brakeman passing over the train discovered the boy on the draw-head between the cars, and he was asked by the brakeman where he was going, and if he had any money to pay his fare; and the boy told him he was going to Kansas City, and was without any money, and could not pay fare. The brakeman then directed him to get off the train. He said he would if they would slow up or stop the train. He was then informed by the brakeman that the train was going slow enough for him to get off, and that he must jump off the train. The boy then climbed into the ladder on the side of the car. The brakeman stepped from the car he was on to the end of the car where the boy was, and told him to get off or he would throw him off. In obedience to this demand, he jumped off the train, and in falling his leg was caught under the wheels of the car, and his foot and ankle crushed. He was picked up by a man and carried to a hotel, and it was found necessary to amputate his leg between the knee and ankle.

The evidence does not disclose what the duties of a brakeman are on the defendants' road. We presume, in the absence of a rule defining his duties, that under the general scope of his employment as a servant of the company on the train, concerned in its management, and aware of the fact that a person who got upon the train with the intent to ride thereon, without paying fare, was a trespasser, and the implied authority in such case, is an inference from the nature of the business, and its actual, daily exercise according to the common observation and experience. Added to this, the testimony of the brakeman, who answered, when asked how it happened, that he stood by and let Long, another brakeman, do all the talking with this young man: "I was to keep them off of my end of the train, and he was to keep them off of his."

Assuming that the brakeman had authority to put trespassers off the train in a lawful manner, yet defendant insists that if the act was done as defendant claims, and the boy was forced off the train while it was running at a speed of eight miles per hour, on a dark night, it cannot be said that the brakeman was acting, in so doing, under the scope of his employment so as to make the company liable. In this the defendant

Facts.

Scope of brakeman's employment.

Same—Brakeman was acting within.

is mistaken. Assuming the case made by the plaintiff, the act complained of was reckless, wanton, and illegal; and, if done within the scope of his employment and authority, he was acting for the defendant, and not for himself. The removal of trespassers from the train was within the implied authority, and became the duty of the servants in charge of the train; and the fact that, in so exercising that right or duty, they acted negligently and wantonly, and caused the boy to jump off the train while running at a speed unsafe for him to get off, and he is injured, will not exonerate the defendant. *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117; *Higgans v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Kline v. Central Pac. R. Co.*, 37 Cal. 400.

The defendant had the right to put him off from its cars, and in doing so could use such force as was necessary to eject him, but in so doing must exercise the right with ordinary care and prudence on its part, and, if the train was moving at such a rate of speed as to render it unsafe, and the night was dark, they must stop or slow up the train; and the mere fact that the boy was on the train as a trespasser was not such negligence as to relieve the defendant from this obligation, and gave its servants no license to negligently and wantonly eject him in a manner liable to do him great bodily harm. *Morgan v. Commissioners Miami Co.*, 27 Kan. 89. And it could make no difference whether he was ejected by actual force or by threats, if he jumped from the train in obedience to a command of the brakeman. He being a boy 15 years old, he would not be expected to use that degree of judgment and discretion that would be expected and required of an adult. He believed, and he had a right to believe, that force would be used to eject him; and when he saw the brakeman coming towards him, threatening to throw him off, he cannot, under the circumstances, be charged with negligence for not having waited longer. *Kline v. Central Pac. R. Co.*, 37 Cal. 404; *Moulton v. Aldrich*, 28 Kan. 312.

Again, he was assured that it was safe to get off the train, and that it was not necessary to slow up. Relying upon either, the defendant cannot be heard to say that his injury was caused by his own negligence. What he was guilty of was in getting on the train without being prepared to comply with the regulations of the company in relation to the carrying of passengers, and trying to beat his way on the train; but, at the time of the injury, defendant well knew of this negligence, and was informed of the facts which showed him to have

Ejection of
trespassers—
Care must be
used.

Contributory
negligence no
defence.

been a trespasser on the train without right, save such right as the defendant owed even to trespassers. And we believe the true rule and doctrine to be that a railroad company is bound to exercise their dangerous business with due care to avoid injury to others, even to the protection of a trespasser who is not guilty of contributory negligence. *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa, 155; s. c., 6 Am. & Eng. R. R. Cas. 222; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207; *Kansas City R. Co. v. Fitzsimmons*, 22 Kan. 686.

The defendant complains of the instructions given by the court to the jury. Some of these objections we deem of not sufficient importance to receive comment. Others are covered by the general discussion of the questions in this opinion. The defendant particularly complains of a part of the sixth instruction, which is as follows: "And I charge you that the plaintiff's right to recover is not affected by his having contributed to the injury, unless he was at fault in so doing." The general rule is that one cannot recover for an injury if he is guilty of negligence directly contributing to the injury. Yet, under the facts in this case, if the plaintiff was guilty of negligence, it was in boarding the defendant's train without first procuring a ticket, or having money to pay his fare; in other words, in attempting to beat the company, and be transported for nothing. Technically speaking, the jumping off the train by the plaintiff was negligence; and this instruction, in speaking of the plaintiff's negligence, was considering this class of negligence. In fact, the only claim of negligence relates to these two acts of the plaintiff. We admit that these acts establish negligence taken and considered by themselves alone, unexplained by circumstances and motives, where those acts result in the injury. In the first instance, the negligent act of the plaintiff was discovered by the defendant before the injury; and, after this discovery, by the slightest care on the part of the defendant the injury could have been prevented. Then, can it be said or claimed that, by reason of this negligent act, the plaintiff was injured? As to the latter, it was caused by the acts of defendant's servants while in the discharge of their master's business. If the plaintiff had voluntarily jumped from the train when discovered, while the train was in dangerous motion, or doing so without sufficient provocation or ground for alarm, or in anticipation of danger where none existed, or the failure to exercise reasonable care and caution, situated as he then was, and the like, would not justify or excuse him. So the mere negligent act alone, when shown, will not always determine the right of recovery. The act may exist, and yet be the result of no fault of

Same—In-
struction.

him who commits it. We see no error in this instruction. *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593; *City of Wyandotte v. White*, 13 Kan. 192.

The defendant again presents a single sentence from the ninth instruction, and claims it to be error: "Plaintiff was only required to exercise ordinary care to avoid injury." The ninth instruction, taken altogether, we think was properly given. It was as follows: Degree of care required of plaintiff.

(9) "Plaintiff was only required to exercise ordinary care to avoid injury; but this requisite could only be complied with by the exercise of that degree of caution which persons of his age and intelligence and of ordinary prudence would use under the same conditions of danger, and with like knowledge of the situation." This instruction, viewed in the light of the facts, properly states the law applicable to the facts. The plaintiff was on a train, and a trespasser. He was entitled to no protection from an injury resulting from his own acts or conduct, and could claim not protection from injuries received while so trespassing on the defendant's train, resulting from the ordinary and useful operation and management of the defendant's train; but to meet and protect himself against the wrongful acts of the defendant, he was not required to exercise more than ordinary care, considering his age, his situation and condition and surrounding dangers. When he became a trespasser upon the train, he had no right to believe that, by reason of that fact, he was to be negligently or wantonly expelled, or ejected in a manner that would result in serious injury to himself. *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 626; s. c., 4 Am. & Eng. R. R. Cas. 562.

In conclusion, defendant insists that the special findings of the jury show passion towards the defendant. We have carefully examined the special findings, and find no evidence of this charge; but, on the contrary, find all Special findings. of the special findings supported by some evidence.

True, upon some questions the evidence was conflicting; but because the jury believe one set of witnesses, and disbelieve others, is not of itself evidence of passion or prejudice. *Kansas Pac. R. Co. v. Kunkel*, 17 Kan. 145; *Whitaker v. Mitchell*, 58 Cal. 362.

We find no error in the record, and therefore recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

Negligence in the Expulsion of Trespassers from Trains.—See note, 31 Am. & Eng. R. R. Cas. 376, where the cases are collected.

WAY
v.
CHICAGO, ROCK ISLAND AND PACIFIC R. CO.

(*Iowa Supreme Court. December 15, 1887.*)

Personal Injuries—Pleading—Redundant Averments.—A person having by statute a claim against a railroad company for damages for personal injuries caused by gross negligence on the part of the company's servants, although upon a train under such circumstances that the relation of carrier and passenger did not exist, an allegation in an action for injuries caused by the company's gross negligence, that the plaintiff was a passenger is merely redundant, and will not defeat the plaintiff's recovery.

Same—Trespasser on Train—Gross Negligence.—In an action for damages for personal injuries under a statute giving a right of action to persons injured while upon railroad trains, although the relation of carrier and passenger did not exist, if the injury was caused by the gross negligence of the company's servants, the company is liable to a person who was injured while in the caboose of a freight train without the knowledge of the engineer or brakeman, if they knew or had reason to believe that the caboose was occupied, and yet moved the train recklessly or negligently without regard to the safety to those who might be in the caboose, and in such a manner that injury to them might reasonably be expected as the direct consequence thereof. ADAMS, C.J., dissents.

Same—Instruction—Verdict Contrary to.—If, in such an action, the court have instructed the jury that plaintiff could not recover unless, in addition to the fact that a collision in the course of the coupling of the train was of unusual violence, he had proven some circumstances which had tended to show that the engineer or fireman acted negligently in making the coupling, the supreme court will, on appeal, set aside a verdict which disregards such instruction even though the instruction be erroneous.

APPEAL from Circuit Court, Mahaska County.

Action by Richard F. Way, administrator, to recover damages for personal injuries sustained by his intestate while travelling in the caboose of one of defendant's freight trains. Defendant appeals from a verdict and judgment for the plaintiff. The opinion states the case.

T. S. Wright and Lafferty & Morgan for appellant.
John F. Lacy and Wm. R. Lacy for appellee.

REED, J.—1. The suit was instituted by the intestate in his life-time. It was alleged in the petition that he was a passenger on the train at the time of the injury, and that the em-

ployees of defendant in charge of the train, while switching, caused the cars to collide violently, whereby he was thrown with great violence against the cupola platform in the caboose in which he was at the time, inflicting the injuries complained of. On the trial of the issue joined on these allegations, it was proven that the intestate was riding on a commutation ticket which had been issued to another person, and which contained a condition against the assignment thereof, and that the conductor of the train, when he took up the coupons for the fare of the intestate, had no knowledge that he was not the person named in the ticket. On appeal it was held by this court that, upon that state of facts, the relation of the carrier and passenger was not created between the parties, and consequently that defendant could not be held liable on proof of that slight degree of negligence upon which it would have been chargeable if that relation had existed. See *Way v. Railway Co.*, 64 Iowa, 51. When the cause was remanded, plaintiff filed an amendment to his petition, retaining the allegations of the original petition, and alleging, in addition thereto, that the injury was caused by the gross negligence of the employees in charge of the train. On the second trial the proof as to the circumstances under which the intestate was on the train was the same, and counsel for the defendant, by motion to direct a verdict and instructions as requested, asked the circuit court to rule that the petition was unproved in its general meaning. The position of counsel is that, as it was distinctly averred in the petition that the intestate was a passenger on the train at the time of the injury, there could be no recovery without proof of that fact, and consequently, as there could be no pretense under the facts proven, and the former holding of this court, that the relation of carrier and passenger existed between the parties at the time of the injury, the court erred in refusing to direct the jury to find for defendant. But we think this position is not maintainable; for, while the defendant would have been liable if intestate had been a passenger, and the injury had been occasioned by but slight negligence on its part, it would also, under the statute (Code, § 1307), be liable, even though that relation did not exist, if the injury was caused by the gross negligence or mismanagement of the employees in charge of the train; so that the allegation that he was a passenger was redundant if plaintiff relied upon the averment of gross negligence, as, also, was that averment if he relied upon the allegation that intestate was a passenger. The petition, then, alleges two states of fact, upon either of which defendant would be liable, and some of its averments, while material to one of these, are redundant as to the other. And plaintiff was entitled to re-

cover if he had established either of them, even though he had failed to prove the allegations which as to it were redundant. Possibly he could have been required, upon proper motion, to strike out one of the averments, or to plead the two states of facts in separate counts; but no such motion was made. Very clearly, we think, his right of recovery was not defeated alone by the failure to prove the allegations that the intestate was a passenger at the time of the injury.

2. The train was at Otley when intestate received the injury. The engineer and a brakeman were engaged in switching at the time. The caboose and 11 freight cars were left standing on the main track, while a number of cars were being cut out of the train and thrown upon a side track. When this work was done, and the engine and remaining cars were backed up to be coupled to those standing, they struck with such force that the intestate, who was standing in the caboose, was thrown against the corner of the platform of the cupola by the concussion, and sustained the injury complained of. Neither the engineer nor the brakeman knew that he was in the caboose. The defendant asked the circuit court to instruct the jury that, before they could find for plaintiff, they must find from the evidence that the employees in charge of the train were guilty of negligence so gross as to amount to willfulness, and that a mere failure to exercise ordinary care in handling the train would not be sufficient; but that there must have been such conduct as indicated an intention to handle the train as they did, knowing when they did so that it would result in injury to the deceased. The circuit court refused to give the instructions asked. It told the jury, in effect, however, that, while willfulness or an actual intent by defendant's employees to injury the deceased, was not an element of plaintiff's cause of action, yet he would not be entitled to recover unless he had shown that the act which caused the injury was grossly negligent. It also told them that, if the employees who were engaged in moving the train knew or had reason to believe that the caboose was occupied, and yet moved it recklessly or negligently, without regard to the safety of those who might be in the caboose, and in such a manner as that injury to them might reasonably be expected as the direct consequence thereof, and deceased was injured thereby, defendant was liable. In so far as the instructions hold that there could not be a recovery, unless it was shown that the act complained of was grossly negligent, they are favorable to defendant, and we need not inquire as to their correctness; and we are of the opinion that the circuit court rightly refused to instruct, that an actual intent to inflict an injury must be shown, to entitle the plaintiff to recover. Such

intent is not necessarily an element of gross negligence. An act may be committed without any specific intent to injure another, and yet be done with such disregard of the safety of others as to render it grossly negligent.

It may be conceded that, as the intestate was in the caboose without right, defendant owed him no special duty, and that its employees were not bound to ascertain whether he was there before commencing the work in which they were about to engage. Neither were they required to govern their conduct with reference to the possibility of his being there. But the caboose was liable at any time to be occupied by passengers, and the employees were required to take that fact into account in the performance of their duty, and govern their conduct with reference to it. If they performed the duty in a manner so unusual or reckless as to endanger the lives or safety of persons who might be rightfully in the caboose, they were guilty of negligence; and if, as the direct consequence of such negligence, the deceased was injured, the company is liable, notwithstanding the fact that he was in the caboose without right; for, by the statute referred to above (Code, § 1307), it is made liable for "all damages sustained by any person . . . in consequence of the neglect of agents, or by any mismanagement of engineers or other employees."

3. The circuit court gave the following instruction to the jury: "The mere fact, if it be a fact, that the cars were thrown together with more than usual force, is not of itself sufficient to establish the defendant's negligence; and while it is proper for you, in determining the question of negligence, to take into consideration the force of the collision, yet, though it may have been of unusual force, you are not to presume from this alone that it was the result of carelessness or gross negligence; but the acts of carelessness or negligence must be established by a preponderance of the testimony. If the shock to the caboose was caused by the failure of the engineer or brakeman to properly calculate the weight of the train, the distance to be travelled, or the amount of slack in the train while honestly endeavoring to make a safe and proper coupling, the plaintiff cannot recover; and it is for you, as reasonable men, to determine from all the evidence whether or not the defendant's employees were guilty of such negligence as, under these instructions, entitles the plaintiff to recover." The clear meaning of this instruction is that plaintiff was not entitled to recover unless he had proven some circumstance in addition to the fact that the collision was of unusual violence, which tended to show that the engineer or fireman acted negligently in making the coupling. We are clearly of the opinion that the jury disregarded this instruction. We have

found in the record no evidence which tended in the slightest degree to show negligence in the operation of the train, except the fact of the violence of the collision; nor have counsel pointed out any such evidence. Indeed, the evidence, aside from that which tended to show that the cars went together with unusual violence, was to the effect that the coupling was made in the usual manner, and that the shock was occasioned by causes which could not be guarded against. We will not inquire whether the instruction is correct or not. It was given as the law of the case, and should have been respected by the jury. A verdict which has been found against the instruction of the court should be set aside, even though the disregarded instructions should be erroneous. Upon the theory adopted by the circuit court on this question, the cause should have been taken from the jury; for, upon that theory, there was nothing for them to pass upon. But having submitted the question to them, their verdict should have been set aside as contrary to the instruction. The judgment must be reversed.

ADAMS, C.J., dissents from the holding in the second paragraph of the opinion.

SEEVERS, J., took no part in the determination of the case.

ATCHISON, TOPEKA & SANTA FE R. CO.

v.

GANTS.

(Kansas Supreme Court, February 11, 1888.)

Passengers—Through Trains—Regulations as to Stoppages.—A railroad company may adopt a regulation that one of its through or fast trains, running regularly on its road, shall only stop at certain designated stations or places.

Same—Duty of Passenger—Inquiries as to Stoppages.—It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop, according to the regulations of the railroad company.

Same—Trespasser—Refusal to Pay Fare.—Where a person purchases a railroad ticket for a designated station upon a railroad, without making any inquiries or ascertaining what train stops at the station to which he desires to go, and subsequently takes his seat in a car of a train which,

according to the regulations of the company, does not stop at the station for which he has the ticket; and such person refuses to pay his fare, on demand of the conductor, to the next station at which the train is to stop, and also refuses to leave the train when requested so to do by the conductor after he has stopped the train at a suitable place for that purpose, such person is a trespasser upon the train.

Same—Ejection.—A trespasser may be ejected from a train after it has stopped at a place other than a depot or station, provided care is taken not to expose his person to serious injury or danger; but, in such an ejection, the railroad company is not required to have consideration for the mere convenience of the wrong-doer.

Same—Excessive Violence—Resistance.—The conductor and train men of a railroad train have the right to eject a trespasser from the train at any suitable place, but in doing so they should not use unnecessary force or excessive violence; if, however, such a person forcibly resists ejection, he cannot recover for the force used in overcoming his resistance, where such force is without intention on the part of the conductor or train man to commit unnecessary injury. In such a case the railroad company is only liable for such unnecessary force or excessive violence as is wilful, wanton, or malicious.

Same—Mistake of Agent—Damages.—When a person makes a mistake in taking a seat upon a train which does not stop at the place he desires to go, and fare is demanded of him upon the train by the conductor to the first station at which the train is to stop, and he is able to pay the same, but refuses so to do, and then the conductor stops the train and requests him to leave or pay, he should either pay his fare or get off. If his mistake was induced by the ticket agent of the company, then the extra fare which he pays is an element of damages, in addition to such as are occasioned by his being carried beyond his destination.

Same—Ejection—Refusal to leave Train.—A person upon a railroad train cannot insist that the conductor shall permit him to ride without a proper ticket for that train, in violation of the regulations of the company. No one has a right to resort to force to compel the performance of a contract, and therefore where a person upon a train by mistake of the local ticket agent has a ticket to a station that the train does not stop at, he must either pay the extra fare demanded or get off when ordered so to do and cannot invite force in his ejection or removal, merely to make a case against the company or to increase his damages.

Same—Profane Language—Evidence.—A plaintiff was ejected from a railroad train, and evidence was offered tending to show that before his ejection he used vile, obscene, and profane language in a car filled with passengers, including many women and children. Upon his part, he introduced two witnesses, one of whom testified "that he never heard him use half a dozen oaths in his life," and the other that "he never heard him use obscene language in public, but might have heard him make use of an oath some time, but not frequently." *Held*, that such latter evidence was incompetent.

Same—Conductor—Branch Road—Authority.—A conductor upon a branch road, or connecting road of the same railroad company, in collecting fares, taking up tickets, and giving information to the passengers on his own train, represents the company as to his own route, but does not represent the company in giving information as to the running and operation of the trains upon the main line with which he has no employment.

Same—Ejection—Passengers Assisting Conductor—Use of Violence.—Where a person is removed from a railroad train with the assistance of some of the passengers, and wilful, wanton, and malicious force is used in the ejection by the passengers assisting, the railroad company may be

liable therefor, although no express directions were given by the conductor or train men to the passengers, as their employment to assist may be inferred. Otherwise, however, if the passengers are mere interlopers and the conductor and train men have no opportunity to interfere with their actions.

ERROR to District Court, Harvey County.

On May 29, 1885, A. C. Gants brought his action against the Atchison, Topeka & Santa Fe R. Co., and in his petition alleged: That at all times hereinafter mentioned the defendant was and now is a corporation duly organized under and pursuant to the laws of the State of Kansas, and was the owner of a certain railroad known as the "Atchison, Topeka & Santa Fe Railroad," with the tracks, cars, and other appurtenances thereunto belonging, and was a common carrier for hire and reward from the city of Newton, in Harvey county, to the city of Peabody, in Marion county, being wholly within the State of Kansas. That on the 19th day of May, 1885, the defendant, in consideration of the sum of 50 cents, then paid to it by the plaintiff therefor, at its ticket-office in the city of Newton, issued to him a ticket entitling him to a first-class passage and to be carried from the said city of Newton to said city of Peabody, and thereby undertook and agreed, as such common carrier, to transfer and carry the plaintiff from said city of Newton to said city of Peabody as a passenger; and plaintiff thereupon entered one of the cars of the defendant, to be conveyed from said city of Newton to the city of Peabody aforesaid. That while he was such passenger at said county of Harvey, and when at a distance of about three miles from the said city of Newton, on said line of railroad and on the day aforesaid, the defendant, by the conductor and train men on said train, set upon the plaintiff and, with unnecessary violence, assaulted, beat, bruised, cut, maimed, wounded, and lacerated the plaintiff in the most grievous manner; took from him said ticket; seized and despoiled him of a large amount of money, to-wit, the sum of \$100, and then and thereafterwards threw and ejected him forcibly and violently from one of its cars upon a heap of stones, cutting, lacerating, and bruising him, thereby causing lasting and permanent injury to him the said plaintiff. That ever since that time he has suffered from internal injuries received therefrom as aforesaid, so that he cannot retain food in his stomach; but, immediately after eating, is attacked with violent vomitings and retchings, causing him great pain and suffering; that since that time he has been unable to pass urine or fecal matter without the use of artificial means, and then only with great pain; that he has suffered great pain along the region of his spinal column, and

was, by the said acts of the defendant, permanently and seriously injured in his spine; that plaintiff, on account of said injuries, has suffered and languished from hence hitherto. That the plaintiff was then in good health, and was then earning, and continuously able to earn, prior to the injuries complained of, \$75 per month; that he was thereby disabled from attending to his business for the space of ten days thereafter, being wholly, or almost, deprived of the use of his limbs, and has been compelled to pay \$150 for medical attendance. That on account of said injuries so received, plaintiff has suffered great mental and bodily anguish, to his damage of \$50,000. Wherefore plaintiff prays judgment against said defendant for \$50,000, has damages sustained by reason of the premises so as aforesaid alleged, and all other proper relief.

On June 29, 1885, the railroad company filed the following answer: (1) Now comes the defendant in the above-entitled cause, and, for answer to plaintiff's petition filed therein, denies each and every material allegation therein contained. (2) The defendant further answering, for a full and complete defence states on the occasion complained of in the petition the plaintiff attempted to ride on the fast passenger train of defendant, bound eastward, which train, according to the rules and regulations of the defendant, which were well known to the plaintiff and the travelling public, generally did not stop at Peabody, and that the conductor of said train, put the said defendant off the said train, using no unnecessary force, because the plaintiff refused, after demand, to pay fare to the station beyond Peabody, namely Florence, at which said train would stop, and further, because said plaintiff, when the conductor informed him that the train would not stop at Peabody, insisted upon riding upon said train, and used violent, profane, and offensive language, and behaved in such an indecent manner as to authorize and justify the defendant's conductor in ejecting him from the train. Wherefore, defendant prays judgment.

On July 1, 1885, Gants filed a reply containing a general denial to the matters and things alleged in the second defence of the answer. Trial had at the February term for 1886, before the court, with a jury. The jury returned a verdict for the plaintiff, and assessed his damages at \$4000. They also made the following special findings of fact: "(1) Is it not a fact that the train upon which the plaintiff attempted to take passage from Newton to Peabody, Kansas, was a train which, under the rules and regulations of the defendant in force at that time, did not stop at Peabody, Kansas, unless it had passengers upon it from west of Newton? *Answer, Yes. Q.* (5) Prior to the time the train started upon which plaintiff

attempted to take passage from Newton to Peabody, Kansas, did not plaintiff know, or was he not informed, that such train would not stop until it arrived at Florence, Kansas? *A.* No.

(6) Is it not a fact that when the conductor came up to the plaintiff on the train on which plaintiff was attempting to take passage from Newton, Kansas, to Peabody, Kansas, to demand plaintiff's fare, that plaintiff handed to such conductor his ticket, and that such conductor then and there informed him that the train did not stop at Peabody, Kansas, but that its first stop would be at Florence, and that he, the conductor, would accept such ticket for the amount paid for it on the plaintiff paying to him the fare from Peabody to Florence, and that he would carry the plaintiff to Florence? *A.* Yes.

(7) Is it not a fact that the plaintiff refused to pay to the conductor of the train on which he was attempting to take passage from Newton to Peabody, Kansas, the amount of fare from Peabody to Florence, the point at which said train first stopped under the rules and regulations of the defendant, after he was informed that such train would not stop at Peabody, and that its first stop would be at Florence? *A.* Yes.

(8) Is it not a fact that the conductor, in the last question referred to, informed the plaintiff that if he would not pay, in addition to his ticket, the fare from Peabody to Florence, that he, the conductor, would have to stop the train, and put him, the plaintiff, off? *A.* Yes.

(9) Is it not a fact that the conductor of the train upon which the plaintiff was attempting to take passage from Newton to Peabody stopped such train for the purpose of putting plaintiff off after his refusal to pay his fare from Newton to Florence? *A.* Yes.

(10) Is it not a fact that, at the time of stopping such train for such purpose as referred to in the last question, the conductor of such train was actuated by a desire to obey the rules of the company, by whom he was employed? *A.* Yes.

(11) Up to the time the train was stopped for the purpose of putting off plaintiff, had the conductor of such train demeaned himself in any way different from that of a gentleman towards the plaintiff? *A.* No.

(12) Prior to the time that plaintiff was actually put off from the train, did plaintiff offer to pay his fare to the first station at which the train he was upon stopped, under the rules and regulations of the defendant? *A.* No.

(13) Is it not a fact that, after the train was stopped, the conductor of such train requested the plaintiff, in a gentlemanly manner, to leave the train? *A.* Yes.

(15) State if it is not a fact that the plaintiff resisted being put off from the train, after it had come to a full stop, to the utmost of his power and ability? *A.* Yes.

(16) How many people were actually engaged in getting plaintiff from the

place where he was seated in the car, after the train stopped, to the platform of such car for the purpose of putting him off?

A. Three. (17) Under the resistance offered by the plaintiff to being put off from the train, how much less force would it have taken to put him off than was used? State fully. *A.* One-half less, or two men should have taken him out of the car.

(18) Was it not a fact that, after the train was stopped for the purpose of putting plaintiff off from it, and before any hands were laid upon the plaintiff to put him off from such train, that plaintiff refused to go off, and dared the conductor to put him off? *A.* Yes. (19) Is it not a fact that the car, in which the plaintiff was seated at the time he was put off from the train, was pretty well filled with passengers, including many ladies? *A.* Yes. (21) State fully what acts of force or violence were used by the conductor, or any person, in putting plaintiff off from that train, in excess of that force which was required and made necessary to be used by the resistance of the plaintiff. *A.* The force that produced the wounds on hands, back, and limbs. (23) Could the conductor on that train, under the resistance offered by the plaintiff, remove plaintiff from it without assistance? *A.* No. (24) Could the train men of that train have removed plaintiff, under the resistance which he offered, without the use of a great deal of force? *A.* Yes. (25) State for what purpose the plaintiff offered the resistance which he did offer to being removed from that train. *A.* Because he thought he had a right to be on that train. (27) If the jury find for the plaintiff they may state how much they allowed plaintiff for moneys expended by him for medicine. *A.* Ten dollars. (28) If the jury find for the plaintiff, they may state what they allowed plaintiff for expenses incurred for medical attendance. *A.* Twenty-seven dollars. (29) If the jury find for the plaintiff they may state what they allowed plaintiff for loss of time. *A.* Sixty dollars. (31) If the jury find for the plaintiff they may state what portion of the verdict that they find was given for money which the plaintiff lost at the time of being ejected from the train. *A.* Four dollars."

Subsequently the railroad company filed its motion for a new trial, which was overruled, and judgment was entered upon the verdict in favor of Gants and against the railroad company. The railroad company excepted and brings the case here.

Geo. R. Peck, A. A. Hurd, and C. N. Sterry, for plaintiff in error.

Ady & Henry for defendant in error.

HORTON, C.J.—On May 19, 1885, A. C. Gants, a hotel

clerk at Wichita, took a passage on a train of the Atchison, Topeka & Santa Fe R. Co. from Wichita to Newton, intending to go to Peabody. He paid his fare

Facta.

to the conductor on the train from Wichita to Newton. He claims he was told by the conductor of the Wichita train that he could either continue on the train, or go upon one an hour later. While at Newton he purchased a ticket over the Atchison road for Peabody, and paid for it 50 cents. He remained at Newton nearly an hour, to get shaved and look around the town, and about nine o'clock he took his seat in a car of a train at the depot. This was the eastern fast train, commonly called the "Cannon-Ball." According to the regulations of the railroad company, this train was scheduled not to stop at Peabody, except for the purpose of letting off passengers who had taken passage at some point west of Newton. But when it had no such passengers it would not stop at Peabody going east, and its first stopping place would be Florence. Peabody, is a station between Newton and Florence, about four miles west of Florence. The local train, which stopped at Peabody, left Newton before the Cannon-Ball. According to the evidence of the railroad company, a brakeman upon the Cannon-Ball announced, before the train started, that "it would not stop until it got to Florence." Gants testified that just as the train started from Newton a train man came to the door and said, "This train will not stop until it gets to Florence," but he claims he did not know then where Florence was. He further testified: "*Question.* How long did the train, which you say you boarded, and saw headed to the east, remain there? *Answer.* I think about twenty minutes. *Q.* You had ample opportunity to get a ticket and had ample opportunity to ask the men who were employed about that train, whether that train stopped at Peabody? *A.* Yes, sir; I expect I did if I wanted to. *Q.* You made no inquiries? *A.* No, sir. *Q.* It is a fact from the time you arrived on the train going from Wichita to Newton, you made no inquiries as to that train,—as to what time the train started, and whether it stopped at Peabody? *A.* No, sir. *Q.* Never made any inquiries, either of the ticket agent or any person who had apparently charge there, although the train was standing there fifteen or twenty minutes after it got there, and while you were there? *A.* I do not think I did. *Q.* How soon did you get aboard of this train before it started? *A.* I cannot say; probably five minutes." Gants, however, testified that, when he bought his ticket for Peabody at Newton, he was told by the agent, who sold him the ticket, "to take the next train." After the Cannon-Ball train had left

Newton and gone about three miles, the conductor called upon Gants for his ticket. He presented a ticket for Peabody, and the conductor informed him that the train did not stop at Peabody, and demanded from him 34 cents in addition to his ticket for the fare from Peabody to Florence. Gants refused to pay the additional fare. The conductor then informed him that if he did not pay, in addition to his ticket, the fare from Peabody to Florence, he would have to stop the train and put him off. Gants replied "that he would have to put him off, as he would not pay any further." The conductor then told him he would put him off, and stopped the train for that purpose. After the train had been stopped the conductor requested Gants, in a gentlemanly manner, to leave the train. He refused to get off, and dared the conductor to put him off. He resisted being put off to the utmost of his power and ability. On account of this resistance the conductor was unable himself to remove him; but with the assistance of two or three persons he succeeded in ejecting him from the train. After the train stopped, and while the conductor was attempting to eject Gants from the car, a severe altercation took place between them; the railroad company offered evidence tending to show that Gants during this time used vile and profane language to the conductor, in the car, which contained many passengers, a number of them being ladies. After Gants was ejected from the train, he walked a portion of the way back to Newton, and then got upon a hand-car and rode to Newton, arriving there between 10 and 11 o'clock in the forenoon. In the afternoon or evening of the same day he went to Peabody from Newton upon a local train, and the same day returned to Wichita. Upon his part he claims that he was wrongfully ejected from the train, and was unlawfully kicked, bruised, and injured in being ejected. This action was brought to recover damages therefor. Verdict and judgment for Gants for \$4000. The railroad company moved for a new trial, which was refused, and brings the case here.

The important questions presented in the record are—First, whether the railroad company had the right to eject Gants from the train; second, if the railroad company had the right, and Gants resisted to the utmost of his power and ability, whether he can recover for the injuries inflicted in his removal, unless they were wilful, wanton, or malicious.

The law is well settled that, in the absence of statutory provisions to the contrary, a railroad company may adopt a regulation that a certain train or trains of passenger cars, running regularly on its road, shall not stop at designated stations or places; and it is the duty of a person about to take passage on a railroad

Regulations as
to stopping
trains.

train to inform himself when, where, and how he can go or stop, according to the regulations of the company. *Railway Co. v. Nuzum*, 50 Ind. 141; *Beauchamp v. Railroad Co.*, 9 Am. & Eng. R. R. Cas. 307-317; *Railroad Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340; *Railroad Co. v. Swarthout*, 67 Ind. 567; *Logan v. Railroad Co.*, 77 Mo. 663. In this State there is no statutory provision to the contrary, and as the train upon which Gants took passage was not to stop, under the regulations of the company, until it reached Florence, the conductor had the right, after the train started, to stop the train and require Gants to leave it, if he refused to pay the fare which, in addition to the sum paid for his ticket, would have entitled him to ride to Florence. *Fink v. Railroad Co.*, 4 Lans. 147; *Railroad Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340; *Railroad Co. v. Hine*, 64 Pa. St. 276. It was the duty of the railroad company to the public to run its trains according to its regulations, and it was also the duty of Gants to have informed him-

Duty of passengers—Inquiries as to stoppage of train.

self whether the train stopped at Peabody. It is claimed, however, upon his part, that when he purchased his ticket he was told by the agent to take the next train, and therefore that he was without fault in getting upon the Cannon-Ball.

In his direct examination Gants testified: "*Question.* Upon your arrival at Newton, what did you do? *Answer.* I bought a ticket and went up town." *Q.* For what purpose? *A.* I wanted to get shaved and look around the town a little. *Q.* How long did you remain in Newton? *A.* Why, I should say a little over an hour; a little over an hour perhaps." If he purchased his ticket immediately upon his arrival at Newton, the agent at the depot very properly told him "to take the next train," as there was evidence tending to show that a local train, which stopped at Peabody, left Newton for the east soon after Gants reached there. Subsequently, in his examination, Gants testified that he bought his ticket after he got shaved and had looked around the town. If this be true, and he was misinformed by the ticket agent, and thereby induced to take the first train going east, which did not stop at Peabody, this would give him a remedy against the railroad company for its breach of contract, but would not justify him in refusing to leave the train when ordered so to do by the conductor. "The business of railroads can only be carried on safely by having regularity. If trains are arranged in a certain way, and their time fixed in regard to limited stoppages, a conductor would never be safe, if he were bound, at his peril, to ascertain from any mere stranger the existence of an agreement by the company to

change the arrangement, and stop at an unusual place.”
Railroad Co. v. Pierce, supra.

Under all the evidence in the case, whether Gants was upon the train by mistake or wrongfully, he should have paid the extra fare to Florence, when demanded, or left the train when it stopped, and he was ordered to get off. If his mistake was induced by the company's ticket agent, then the fare from Peabody to Florence would be a proper element of damages, in addition to such as were occasioned by the failure to take him to Peabody on the train which he was told to take. If, however, he was misinformed by the local agent, but subsequently, after entering the train and before it started, was afforded such means of correct information by the announcement of the brakeman or otherwise, as a reasonable and prudent man would not neglect, he could not thereafter rely in good faith upon the incorrect statement of the agent from whom he bought his ticket. Even if Gants made a mistake in taking the train, induced by the ticket agent, it was not necessary for him to invite force to secure his legal demands. In *Townsend v. Railroad Co.*, 56 N. Y. 295, Grover, J., said: “No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case.” In *Bradshaw v. Railroad Co.*, 135 Mass. 407, Allen, J., said: “If a railroad company has agreed to furnish a passenger with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract, but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger, who has once paid, to submit to an additional exaction, but, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are, in fact, inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket.” In *Railroad Co. v. Connell*, 112 Ill. 295, Craig, J., said: “We entertain no doubt that appellee

Duty of plaintiff to pay extra fare and not to invite use of force.

was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expenses necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton." In *Hall v. Railroad Co.*, 15 Fed. Rep. 61, Hammond, J., said: "The conductor is somewhat like the master of a ship. He has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. He should be obeyed by the passengers, and the common notion that force must be invited to secure legal demands against his unlawful exactions is, in my judgment, erroneous and vicious. All that a passenger need do is to express his dissent to the demand made upon him, and he need not require force to be exerted to secure his rights; certainly not to increase his damages. . . . I fully recognize the feeling of a 'free American citizen' in the face of threatened wrong or insult, but the safety of the ship forbids that he should fight with the master, and imperil the ship and lives and property she carries. Better that he should suffer the wrong than to endanger or discomfort his fellow passengers. The conductor of a railroad train is not altogether as supreme, perhaps, as the master of a ship; but, on analogous principles, that seem to me obvious, it is, I think, the duty of a passenger to avoid resistance beyond mere dissent, and submit to his authority without more than mere protest, unless resistance is necessary to defend himself against impending personal injuries." See also *Southern Kansas R. Co. v. Hinsdale*, *ante*, p. 256. Clearly, if Gants was a trespasser upon the train, as this case was put to the jury, then the conductor had the right to put him off, and it was his duty to go off without being forced to do so. If the conductor had the right to put him off, Gants, at the same time, could not have a legal right to resist, and necessarily he could not resist the conductor in the discharge of a duty and the exercise of a right, and by that resistance acquire a right to resort to any force to overcome it. Of course, we do not intend to intimate that a trespasser upon a train can be treated in a wilful, wanton, and malicious manner. *Railroad Co. v. Kelly*, 36 Kan. 655. In the conclusion which we have reached regarding the right of the conductor to eject Gants from the train, even if he made a mistake in taking it, induced by the ticket agent, upon his refusal to pay the fare demanded, we do not overlook the fact that a railroad company is a public

carrier, and that some of the authorities are in conflict with the doctrine herein announced. A moving train, filled with passengers, including ladies and children, is not the place for a wrangle, a quarrel, or a fight with the conductor. The interests of the public are to be considered in such a case, as well as the interests of a private individual. As was said in *Railroad Co. v. Connell*, *supra*: "It would be unwise and dangerous for the travelling public, to adopt any rule which might encourage resort to violence on a train of cars." This conclusion will prevent breaches of the peace upon railroad trains instead of producing them, and at the same time will fully protect the passenger by making the company responsible for all damages resulting from any breach of its contract. In addition to this, if a passenger has suffered in his business, or been put to expense by the delay or refusal of the railroad company to carry him as promised by its ticket agent, he would be entitled to ample damages therefor. In this connection it is well to state that, where a trespasser is ejected from a train, such ejection may be at a Place of ejection. place other than a depot or station, provided care is taken not to expose his person to serious injury or danger; but in such an ejection, the railroad company is not required to have consideration for the mere convenience of the wrongdoer. *Lillis v. Railway Co.*, 64 Mo. 464; *McClure v. Railroad Co.*, 34 Md. 532; *Railway v. Miller*, 19 Mich. 305; *O'Brien v. Railroad Co.*, 15 Gray, 20.

The trial court in its instructions to the jury treated Gants as a trespasser upon the train, after he refused to pay fare from Peabody to Florence, and to leave the train; but further instructed the jury as follows: "(8) If you find from the evidence that an unnecessary degree of force was employed, and that plaintiff was injured thereby, in that case he would be entitled to recover in this action. . . . (11) But in determining what is a reasonable degree of force, under the circumstances of this case, you should consider the amount of resistance opposed by the plaintiff to those who were attempting to eject him. And if you find that the plaintiff suffered injuries which were the direct and necessary result of the application of force rendered necessary by his own resistance, he cannot recover for such injuries; but the use of a degree of force disproportionate to the resistance to be overcome would render the train men wrong-doers in turn, and would render the company liable for any injuries committed by reason thereof. (12) I instruct you that if the plaintiff had exerted himself to the utmost in resisting the efforts of the

Use of excessive force—Resistance of plaintiff.

train men to expel him, and that in overcoming such resistance the train men used more force and violence than was necessary for the purpose, and without any intention to commit unnecessary injury, and that plaintiff was injured thereby, in such a case the resistance offered by the plaintiff may be considered in mitigation of damages. . . . (20) If, under the evidence and instructions of the court, the jury find for the plaintiff, then in estimating the plaintiff's damages, if they are proved, you have a right to take into consideration the personal injury inflicted upon him, the pain and suffering undergone by him in consequence of his injuries, if any are proved, the loss of time occasioned thereby, the reasonable cost of medical attendance, and also the permanent loss or damage, if any is shown, arising from disability resulting to the plaintiff from the injury in question, rendering him less capable of attending to his business than he would have been if the injury had not been received; plaintiff would also be entitled to any sum of money lost by by him as a direct consequence of the wrongful acts complained of, if they were wrongful, and any money was so lost; and if you further find from the evidence that the injury complained of was inflicted wantonly or wilfully, and that the plaintiff has sustained damages thereby, then the jury are not limited in assessing the damages to mere compensation for damages actually sustained, but you may give him a further sum by way of exemplary or vindictive damages, as a protection to the plaintiff, and as a salutary example." The railroad company requested the following instruction, which was refused: "In determining the question in this case, as to whether the train men on the train from which plaintiff was ejected used more force or violence than was necessary to be used in ejecting plaintiff from such train, you are to take into consideration the amount of resistance offered by plaintiff to such ejection, and if you find that he resisted the attempt of the conductor to put him off from such train with all the force and power he was capable of using, then, and in such case, you are instructed that the law will not, with a nicety, weigh the amount of force necessary to be used in overcoming such resistance, and that in such case the defendant would only be liable in a case of palpable and perfectly apparent use of force beyond that which was clearly necessary to be used in overcoming the resistance offered by plaintiff."

If Gants was a trespasser upon the train, the conductor had the right to eject him, and we think the railroad company can only be made responsible for the injuries in-

flicted which were wilful, wanton, or malicious. In refusing to give the instruction prayed for, and in giving to the jury the twelfth instruction, and also the twentieth, the court made the railroad company liable in damages for all excessive force used in overcoming the resistance of Gants, although such force was used "without any intention on the part of the conductor, or those assisting him, to commit injury." The first clauses of the twentieth instruction permitted Gants to recover for "the personal injuries inflicted upon him, and the suffering undergone by him in consequence of his injuries," although a part of the injuries may have been occasioned in overcoming his own unlawful resistance. In *Galbraith v. Fleming* (Mich.), 27 N. W. Rep. 581, the court said: "The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he comes out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him, or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law." In *Taylor v. Clendening*, 4 Kan. 524, it was held that "where a person, who was the original aggressor in an affray, met with too vigorous a defence, and sued for damages on account of the injuries, he could not recover of his intended victim." It has been decided by this court, time and again, that whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or substantially contributed toward it, he is not entitled to recover; and further, that if the plaintiff is first in fault in infringing upon a defendant's rights, the defendant is absolved from all but slight care, and is liable only for gross or wanton negligence. *Railway Co. v. Rollins*, 5 Kan. 167; *Railway Co. v. Pointer*, 14 Kan. 37. In the latter case it was said by Brewer, J.: "Many considerations, especially the difficulty of correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule, so universally recognized, that where the wrong (the negligence) of both parties contributes to the injury, the law will not afford any relief." In this case, Gants could have remained upon the train and gone to Florence by paying the fare from Peabody to that station; or, when the train stopped, he could have left the train when requested to do so by the conductor, in a gentlemanly manner; and it is clearly evident that if he had done either he would not have suffered any personal injuries at the

Defendant liable for wilful or malicious injury.

hands of the conductor or train men. He stubbornly refused to pay the additional fare, and also forcibly resisted when requested to leave the train. He did all of this after the conductor had informed him the train would not stop at Peabody, and that he must pay to Florence or get off. Under the rule established in this State in *Taylor v. Clendening*, so long ago as 1868, Gants ought not to recover, even if his resistance might have been overcome with something of less force than the conductor and his assistants actually used, unless such excessive force was wilful, wanton, or malicious. By resisting to the utmost of his power and ability, Gants invited force; and he ought not to complain of the force used if there was no intention upon the part of the conductor or his assistants to commit unnecessary injury. On the other hand, it Gants, although a trespasser upon the train, received injuries which were the direct and necessary result of wilful, wanton, or malicious acts of the conductor or those assisting him, he is entitled to his damages. *Railroad Co. v. Kelly*, *supra*. Counsel for Gants insist that the decisions are that a trespasser can recover for all injuries arising from the use of un-

necessary force, without regard to whether it was wilful, wanton, or malicious, and also insist that this court has recognized this rule in *Railway Co. v. Weaver*, 16 Kan. 456, and *Railroad Co. v. Kessler*, 18 Kan. 523. In the *Weaver* case the railway company was found by the jury to have been the aggressor, after the passenger had been ejected and put upon the ground. The expulsion in that case was held to have been wrongful, but as it did not seem to the court to have been wanton or excessively cruel, the damages were deemed excessive and the judgment reversed. In the *Kessler* Case the court held that in the wrongful expulsion of the passenger from the train, the railroad company was guilty of such gross negligence as amounted to wantonness; and yet, even then, with much hesitation it affirmed a judgment of \$820 only. In several of the cases cited by counsel, where damages have been allowed for unnecessary force, the unnecessary force was wanton or malicious. In *McKinley v. Railroad Co.*, 44 Iowa, 314, the acts of the brakeman, for which the company was held liable, were malicious and criminal. In *Bass v. Railway Co.*, 39 Wis. 636, the passenger peaceably and lawfully entered a ladies' car, in which there were many vacant seats, and, when about to occupy one, was rudely and violently seized by the brakeman, aided by a volunteer, and forcibly thrust from the car. The passenger was not first requested to leave the car, or forbidden to enter it. In that case the assault was wilful, wanton, and malicious. In *Jackson v.*

Same—Au-
thorities re-
viewed.

Railroad Co., 47 N. Y. 274, the passenger tendered five cents for fare on a street car, and the conductor demanded six. This was refused. The conductor caught the passenger around the waist, and stopped the car to put him out. The passenger refused to leave the car and resisted. The conductor struck him a blow on his nose, but made no further attempt to eject him. The blow struck by the conductor was held by the trial court to have been wilful and malicious; and the case was reversed because it was not left to the jury to determine whether the act was done without malice or ill feeling. In *Hanson v. Railway Co.*, 62 Me. 84, after the passenger had ceased all resistance and was returning to his seat with his back to the brakeman, the latter struck him several blows with an iron poker, two feet long and half an inch in diameter, about the head and shoulders and over the eye. Evidently the assault of the brakeman in this case was also wilful, wanton, and malicious. In *Coleman v. Railroad Co.*, 106 Mass. 160, the passenger who was ejected was struck two or three heavy blows behind the ear, and thrown bodily upon the platform of the depot. The trial court in that case instructed the jury that the railroad company was responsible for excessive or unreasonable force, but also stated to the jury that the passenger "had no right to resist the process of being put out." In the opinion in that case it was said "that violence on the part of the passenger would increase the violence necessary and proper to be used on the part of the employees; and if it contributed in any degree to the violence of his fall, or to the aggravation of his disease, he cannot recover for the injuries he received. The burden was on him to prove that his own illegal acts did not in any degree contribute to the alleged injury, but that it was wholly caused by the wrongful acts of the railroad company's servants." This language plainly implies that the unnecessary force must be wanton or malicious. We think a critical examination of the decisions will demonstrate the general rule to be that, where parties are permitted to recover solely on account of injuries inflicted by unnecessary force or excessive violence, the facts in the cases disclose that the force or violence used was wilful, wanton, or malicious; and that in most of the cases "unnecessary force" or "excessive violence" was used as synonymous or tantamount to wanton or malicious force. But counsel insist that the excessive force used in this case was wilful and wanton, and therefore the judgment should not be disturbed. We cannot assent to this. Under the instructions the jury were not authorized to separate the force used in overcoming obstinate and forcible resistance

Force used was
not wilful or
wanton.

with no intention to commit injury, from the force ~~that~~ was used wilfully, wantonly, or maliciously, if any such force was used. Even if Gants was upon the train under direction of the ticket agent, and without fault on his part, as before remarked he should have paid the extra fare to Florence, as he was able to do, or left the train when it stopped. For the mistake of the ticket agent, or the wrong of the railroad company, if any, he had ample remedy. *Manufacturing Co. v. Boyce*, 36 Kan. 350.

As a new trial must be ordered we will dispose of the minor alleged errors: There was evidence on the part of the railroad company that, prior to his removal from the train, Gants used vile, obscene, and profane language. Gants in-

Profane lan-
guage—Evi-
dence.

troduced two witnesses to show that he was not in the habit of using obscene or profane language. One of the witnesses testified that he had known Gants over a year, and that he never heard him "use half a dozen oaths in his life." Another witness testified that he never heard him "use obscene language in public, but that he might have heard him make use of an oath sometime, but not frequently." We do not think the answers of the witnesses very material, or as tending to prove much. Whether Gants had a great propensity to use obscene language is not important. If such evidence was permitted, it would present a collateral issue, and we do not think, under the authorities, that this evidence in this kind of a case is competent. *Thompson v. Bowie*, 4 Wall. 463; *Com. v. Kennon*, 130 Mass. 39. Also, the question permitted to be asked, upon cross-examination of one of the witnesses, as to the number of saloons in Las Animas and La Junta, Colorado, was wholly improper because it did not tend to rebut, impeach, modify, or explain any of his testimony. Again, we do not think that the evidence of what the conductor of the Wichita train told Gants was admissible. If it were true, it was not sufficient

Instructions
of conductor
on branch
road.

ground for Gants to refuse to pay his fare to Florence, or to resist removal from the train. A conductor in the line of his duty in collecting fare, taking up tickets, and in giving information to the passengers on his train, represents the company as to the running and operation of his own train, but in this case the Wichita train stopped at Newton, and Gants had to change cars at that place in order to go to Peabody. In the case of *Railroad Co. v. Gilbert*, 2 Am. & Eng. R. R. Cas. 230, cited, the conductor instructed the passenger to keep her seat upon his train, although she had a ticket for a train that branched off in another direction. The court there very properly held that the answer of the conductor was equivalent to saying

she was on the right train, and held the railroad company responsible in damages, but did not intimate that she could have increased her damages by refusing to leave the train when ordered. There was some evidence tending to show that Gants was removed from the train with the assistance of one or two passengers; and it is claimed on the part of the railroad company that the company is not responsible for their acts unless they were requested by the conductor to assist. It was not necessary that the conductor should have given express directions to all concerned in the ejection, but if any passenger aided the conductor or the train men, with his permission and sanction, a jury might infer an employment. If, on the other hand, the passengers were mere interlopers, and the conductor had no opportunity to interfere with their actions, it would not be fair that the railroad company should be held responsible for their acts.

The judgment of the district court will be reversed and the cause remanded for a new trial.

All the justices concurring.

Passenger on Train that Does not Stop at Station Named on His Ticket.—Expulsion.—See *Lake Shore, etc., R. Co. v. Pierce*, 3 Am. & Eng. R. R. Cas. 340; *Beauchamp v. International, etc., R. Co.*, 9 Ib. 307; note, 314; *Trottinger v. East Tenn., etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 49; note, 52; *St. Louis, etc., R. Co. v. Marshall*, 18 Ib. 248; note, 253; *Platt v. Chicago & N. W. R. Co.*, 21 Ib. 319; note, 26 Ib. 201; *Duling v. Philadelphia, etc., R. Co.*, 27 Ib. 84; note, 88; *Hull v. East Line, etc., R. Co.*, 28 Ib. 221.

JARDINE

v.

CORNELL *et al.*

(*Supreme Court of New Jersey, June 20, 1888.*)

Passengers—Ejection—Unnecessary Violence.—A railroad passenger who is unprovided with a ticket entitling him to ride, and who refuses to either pay his fare or leave the train, may be forcibly ejected by the agents of the company. If in so doing, more violence is used than is necessary for that purpose, the company and its agents are liable for damages resulting from such excess of violence.

Same—Police Officer—Special Agent.—A police officer who, in response to the invitation of the regular agents of the company, assists in ejecting a passenger, becomes a special agent of the company for that purpose, and

is subject to the same rule in regard to excessive violence in executing the regulations of the company.

Same—Arrest—Use of Violence by Policeman. If the conduct of a passenger unlawfully persisting in riding in a railroad car is such as to constitute him a disorderly person, a policeman may, by virtue of his office, arrest such disorderly character, notwithstanding the fact that such policeman was originally called in as an agent of the company; and for violence incident to such arrest the company and its agents are not liable.

Same—Police Officer—Official Character.—When a city police officer takes, by force, a disorderly person from the scene of disorder to the police station, such action will be presumed to have been done by virtue of his official character, notwithstanding the fact that prior to such disorderly conduct, the officer was in law the agent of the defendant; and for force used in making said arrest the defendants are not liable.

CASE certified from Circuit Court, Union County; before Justice VAN SYCKEL.

On rule to show cause why a new trial should not be granted. Plaintiff purchased at Rahway, a ticket consisting of three parts, viz., a ticket from Rahway to Waverly, an admission ticket to the State fair at Waverly, and a return ticket from Waverly to Rahway. The plaintiff was carried to Waverly, and admitted to the fair-grounds. In the evening he returned by train from Waverly, in company with his brother and an employe. Soon after leaving Waverly station, the conductor of the defendant's train asked the plaintiff for his ticket, whereupon plaintiff offered him the part of the ticket which entitled him to admission to the fair-grounds. The conductor refused to receive this ticket, and told plaintiff that he must pay a fare or leave the train, which the plaintiff refused to do. The train made its regular stop at Elizabeth; and as it was about leaving that station, the conductor came to plaintiff, and demanded that he pay his fare or leave the train, which plaintiff again refused to do. The conductor then summoned from the station platform the city police on duty there. Plaintiff at this time was seated next to the window, his brother occupied the half of the same seat next the aisle, and his employe was seated near by. The police notified plaintiff that he must leave the car, which plaintiff refused to do. An effort was made by the officer to pull him out of his seat, which, as the plaintiff forcibly resisted, proved ineffectual. At this juncture a general affray arose, during which plaintiff was forcibly removed from the car to the city station-house. For injuries received in the manner above detailed, plaintiff brought his suit against the conductor and the railroad company. A verdict of \$1750 was recovered.

C. T. Parker for plaintiff.

E. T. Green for defendants.

GARRISON, J.—An examination of the plaintiff's case shows that the only act ascribed directly to either of the defendants is that Cornell, the conductor, invoked the aid of the police. This act is significant only as a means of imputing the conduct of the officers to the defendants in this suit. That such a result may be reached is evident from the following well-established principles of law: The agents of a railway company have the right to forcibly eject from the train a passenger who, being unprovided with a proper ticket, refuses to pay fare or to leave the train. *State v. Overton*, 24 N.J. Law, 435; *Carpenter v. Railroad Co.*, 121 U.S., 474. If, in ejecting a passenger, more violence is used than is necessary for that purpose, the company and its agents are liable for damages resulting from such excess of violence. *Steamboat Co. v. Brockett*, 121 U.S. 637. A police officer, by responding to the invitation of the regular agents of the company to aid in enforcing its regulations, becomes, for that purpose, a special agent of the company, and for the conduct of such special agent, within the scope of his employment, the company is responsible. *Collett v. Foster*, 2 Hurl. & N. 356; *Bavley v. Railway Co.*, L. R. 7 C. P. 415; *Burnap v. Marsh*, 13 Ill. 535. The application of these uncontroverted legal principles resulted at the trial of this cause, in the submission to the jury of the single question of fact, whether the force employed by the police was at any time excessive. This disposition of the case assumes that the original acceptance by the police of a special agency to aid in enforcing the rules of the defendant company imparted a persistent color of agency to all these subsequent acts. Upon the theory on which this case was tried, the test as to whether the company was responsible or not was whether the police were called in before or after the breach of the peace. If they came in before the breach of the peace, the jury were told that the defendants were liable; while if they were called in after the breach of the peace, and saw it, then they would be considered to have acted in their official capacity, and no liability would attach to the defendants. This was substantially the ground for the refusal to nonsuit, reserved on that motion, and stated in the charge of the court. This view of the case, it will be observed, assumes the existence of a rule of law to the effect that a peace officer, once having undertaken to act in the capacity which in law constitutes civil agency, cannot, should occasion require, assume and exercise the duties incidental to his official character. The public importance of such a rule of law, if it exists, can scarcely be overstated; for it is evident that

Ejection of
Passengers.

Same—Police
officer—
Agency.

no public officer has a right to disqualify himself for the performance of his official duties, no policeman or other guardian of the peace could render service to a citizen, no matter how sore the need, unless an actual breach of the peace was in progress or perceptibly imminent. Conversely, a peace officer who had endeavored to aid an aggrieved or molested citizen in obtaining or defending his rights would, in the event of subsequent disorder or breach of the peace, be incapacitated from exercising any of his official duties as a public protector. The adoption of a rule which would expose the defenceless to any arrogance short of actual assault, and disqualify a public officer in proportion to his zeal, is not to be seriously considered. It is, perhaps, needless to say that I have been unable to find any authority from which such a rule could be deduced.

Unaided by the assumption of such a controlling principle, the facts of plaintiff's case furnish the most ample grounds for denying him the remedy he had invoked. Judged by his own testimony, and that of his witnesses, his conduct, before the officers were called in, was unlawful in the extreme; while his language and state of mind showed that he lacked nothing but opportunity to become the author of actual disorder. He has himself, upon the witness stand, told what his attitude was in reference to the proposal to put him off the train. He says he was prepared to resist at all hazards, and that it would require a pointed pistol to compel him to submit. Upon the appearance of the police, and the attempt to enforce the rule, resistance ripened instantly into riot. The plaintiff met the attempt to remove him with like force, his brother and servant interposed, and became involved in a hand-to-hand encounter with the police, during which blood flowed freely. In the end, the plaintiff was forcibly taken by the police to the station-house. When we consider that the scene of this disorder was a railroad train about leaving a station on a main line of passenger traffic, conduct more conducive to public discomfort, if not danger, cannot well be conceived. Upon undisputed facts, the plaintiff was a disorderly person. The act of the police, in removing the plaintiff from the train to the station-house, was a continuous one. It was their duty, as officers of the law, to do so; and it was not within the scope of their employment in enforcing the regulations of the railroad company. Upon an indisputed state of the facts, the question presented is for the court. Where a police officer takes a disorderly person from the scene of his disorder to the police station, it will be presumed to have been done in his

Use of force
by police
officer.

Character of
policeman
when arrest
was made—
Defendant not
liable.

official character, unless such presumption is repugnant to some rule of law, or is rebutted by the facts of the case. The facts of the present case, unaided by the assumption that the color of agency inhered to all the acts of the police, present nothing to rebut the presumption of the official character of the arrest. The case, then, stands thus: Plaintiff has sued for injuries inflicted upon him by the wrongful acts of the defendants at the hands of their private agents; whereas the proof is that his injuries were received by him, for his unlawful acts, at the hands of public officers. The result reached is that the plaintiff should have been nonsuited at the trial, and the circuit court should be so advised.

Expulsion of Passenger for Refusal to Deliver Ticket or Pay Fare.—See generally, *Memphis, etc., R. Co. v. Benson*, 31 Am. & Eng. R. R. Cas. 112; *Hall v. Memphis, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 589; *Bland v. Southern Pac. R. Co.*, 3 Ib. 285; *Garrett v. Louisville & N. R. Co.*, 3 Ib. 416; *Lane v. East Tenn., etc. R. Co.*, 2 Ib. 278; *Indianapolis, etc., R. Co. v. Kennedy*, 3 Ib. 467; *Petrie v. Penna. R. Co.*, 1 Ib. 258; *O'Brien v. New York, etc. Co.*, 1 Ib. 259.

Arrest of Passengers. See *Lynch v. Metropolitan El. R. Co.*, 12 Am. & Eng. R. R. Cas. 119; *Commonwealth v. Kennedy*, 18 Ib. 383.

HALL

v.

SOUTH CAROLINA R. CO.

(South Carolina Supreme Court, March 20, 1888.)

Passengers—Ejection—Suitable Place.—If a passenger was not liable to be expelled from the train, and he was expelled at an unseasonable hour of the morning at a place where he was exposed to the weather, when he could have been ejected near his home; as he had requested to be when the dispute arose, these facts may be taken into consideration by the jury in computing the damages, and for the purpose of determining the passenger's right to exemplary damages.

Same—Measure of Damages.—A passenger is not limited to the recovery of only actual damages where it appears that he took a train at a very early hour in the morning, that he was unable to purchase a ticket by reason of the fact that the ticket office was closed; that when asked for his ticket or fare by the conductor he refused to pay an additional charge demanded upon the ground that he had no ticket; that upon the threat of the conductor to put him off, he replied by requesting him to stop and put him off; that the conductor instead of doing so at that place and time, while the train was near the passenger's home, carried him to a sta-

tion some miles further and there expelled him ; and that he was left there in the cold and wet without shelter, the station being still closed on account of the early hour.

APPEAL from Common Pleas Circuit Court, Aiken County.

Action by H. H. Hall against the South Carolina R. Co. to recover damages for a wrongful expulsion from one of the defendant's train. Defendant appeals from a judgment for the plaintiff for \$325.

Brawley & Barnwell and *Henderson Bros.* for appellant.

G. W. Croft and *O. C. Jordan* for respondent.

McIVER, J.—The plaintiff brought this action for damages on the ground that the agent or servant of the defendant company had illegally ejected him from the defendant's railroad train. The facts of the case, as to which there is no dispute here, were substantially as follows: On the 16th of October, 1883, the plaintiff boarded defendant's train at Aiken for the purpose of going to Augusta to meet the remains of his deceased mother. The train passed Aiken at a very early hour, before daylight ; and, although the plaintiff was at the depot in time to have purchased a ticket before the train arrived he was unable to do so because the ticket-office was not open,—the regulations of the company not requiring it to be opened at so early an hour. When the plaintiff was asked for his ticket or fare by the conductor he tendered him 55 cents, the price of a ticket from Aiken to Augusta, but the conductor demanded 10 cents more, upon the ground that he was required by the regulations of the company to charge a person who had no ticket 65 cents. The plaintiff declined to pay the sum demanded, when the conductor told him that if he did not pay it he would have to put him off. The plaintiff then said to the conductor, "Stop your train, and put me off, then." This the conductor declined to do, but carried plaintiff five miles further, on to Graniteville, the next station ; and when the train reached that station the conductor again approached plaintiff, and asked if he must take him up and put him off, to which plaintiff replied, "No ; but he must lead me out, and he laid his hand on me, and led me out." The morning was cold and wet, and the depot at graniteville not being open at that early hour, the plaintiff was left there without shelter. The plaintiff testified that the conductor's manner in refusing the amount offered, and demanding more, with a threat to put him off if he did not pay the amount demanded, was abrupt ; but when he was actually put off the train at Graniteville no violence was used, and no more force

than was necessary to take plaintiff by the arm and lead him off the train. The plaintiff remained at Graniteville until a return train came, which he took, and reached Aiken about 8 o'clock in the morning. The plaintiff also testified that when he first refused to pay the amount demanded, and asked the conductor to put him off then, the train had just left Aiken, and reached a point between the landing of the Highland Park Hotel and the pump where the train sometimes stopped, not more than a mile from Aiken. The jury found a verdict in favor of the plaintiff for \$325, and defendant appeals upon the several grounds set out in the record.

The first ground, which alleges error in the admission of certain testimony, is disposed of by the statement which appears in the "case," that the objection to this testimony was not overruled, but was sustained; and the position taken in the argument, that the plaintiff had the full benefit of this testimony, cannot be sustained. So far as the "case" shows the objection to this testimony was sustained as soon as it was presented, and certainly this is all that could have been expected from the circuit judge, as it does not appear that he was asked to strike out such testimony, or to instruct the jury to disregard it, and refused to do so.

Motion to
strike out tes-
timony.

The second ground of appeal is as follows: "Because it is submitted that his honor erred in charging the jury that, in considering the question of exemplary damages, they must take into consideration 'that he could have been ejected when a few yards from home,' in that said charge involved a question of fact, and should have been submitted to the jury." It seems to us that this ground is taken under a misconception of the charge. The language therein quoted from the charge, taken, as there stated, by itself, and apart from the connection in which it was used, might possibly convey the idea that the circuit judge had stated, as a fact proved in the case, that the plaintiff could have been put off the train within a few yards of his home, and if so it would undoubtedly be objectionable. But when we examine the charge, which is set out in the "case," it is manifest that the circuit judge did not intend to state, and did not state, any fact as proved in the case; but simply stated to the jury, what he had the unquestionable right to do, that if certain facts were established they might take them into consideration in determining whether the plaintiff was entitled to exemplary damages. This will appear from the language of the charge as to this point, which is as follows: "If he was not liable to be expelled from defendant's cars, and he was expelled at an un-

Exemplary
Damages—
Place of ejection.

seasonable hour in the morning, where he was exposed to the weather, when he could have been ejected when a few yards from home, you may take these circumstances in consideration in making up your verdict, and may give exemplary damages." It seem to us clear that the word "if," at the beginning of this sentence, was applicable to each branch of it, and that the plain and obvious meaning of the language used by the circuit judge was that, if the circumstances there mentioned occurred, they were proper matters to be considered by the jury in determining whether exemplary damages should be allowed. As we have frequently had occasion to say, it will not do to take up detached sentences, or parts of sentences, from the charge of a circuit judge, but it must be considered as a whole; for that is the way it is delivered to the jury, and therefore the way in which they must be regarded as considering it; and if we consider this charge in that manner we do not see how the jury could have supposed that the judge was stating to them any fact as proved, but was simply telling them that, if certain circumstances did occur, then they were proper for their consideration in determining the question of damages.

The third ground of appeal is as follows: "Because it is submitted that his honor erred in charging the jury that, in considering the question of exemplary damages, they could take into account that he was ejected at an unseasonable hour in the morning at Graniteville, when he could have been ejected nearer home, in that said charge was calculated to mislead the jury, and incline them to believe that a conductor must eject, not at the next regular station, but at a point nearest the station boarded by the passenger, which is contrary to law and prudence." Here, again, it seems to us that there is a misconception of the charge, arising from looking at isolated portions, instead of considering the parts objected to in the connection in which they are used. The remark made as to the place where the defendant was actually ejected, and the place where he might have been put off the train, and where the plaintiff asked the conductor to put him off, was manifestly intended to indicate one of the circumstances which might be adverted to by the jury, as showing a reckless disregard, or at least a careless indifference to the feelings and wishes of the plaintiff; and we do not see how it could have been regarded by the jury as an expression of the judge's view of the law as to where was the proper place to put the plaintiff off the train. He was not asked to instruct the jury that the conductor could not put off a passenger, who refused to pay the fare demanded, between stations, but was bound to wait until the next station

was reached; and we are not prepared to admit that the law is as claimed in this exception. We are not prepared to lay it down as a rule of law that where a passenger on a railroad train refuses to pay his fare, the conductor cannot eject him between stations, but is bound to take him on to the next regular station before he can be ejected. It seems to us that this would depend largely upon the circumstances of each particular case. For example, in this very case, where the passenger, finding that he was to be ejected desired to be put off at a point near his home, where the train might have been easily stopped, as was shown by the fact that the train had been in the habit of stopping at that point, near the Highland Park Hotel landing, and the conductor refused to do so, but insisted on carrying him to the next station, five miles further on, where, as the conductor must have had reason to know, and where the event proved, there was no shelter at that early hour of the morning to which the plaintiff could obtain access, the state of the weather being such as to render it necessary for plaintiff's comfort, we would not be willing to lay it down as a rule of law that the plaintiff could only be ejected at the next station. On the contrary, we think, with the circuit judge, that there were circumstances proper to be considered by the jury, in determining the question whether exemplary damages should be awarded.

The only remaining inquiry is that presented by the third subdivision of the fourth ground of appeal (the first and second having been abandoned), which imputes error to the circuit judge in refusing to charge "that in no aspect of this case can the plaintiff recover more than actual damages, and if he suffered no actual damages he can recover nothing at all."

Instruction as to damages recoverable erroneous.

The circuit judge laid down the rule as to exemplary damages in terms to which no exception has been taken, and therefore, for the purposes of this case at least, it must be regarded as the correct rule. Hence this request is based entirely upon the assumption (1) that there was no testimony whatever tending to show that the plaintiff was entitled to recover exemplary damages; (2) that, where such is the case, the judge is bound to instruct the jury that they cannot give exemplary damages, but must confine themselves exclusively to the actual damages proved in the case. Inasmuch as the first assumption is, in our opinion, unwarranted, we need not consider the second. As we have intimated above, there were some circumstances in the case tending to show that it was a proper case for exemplary damages, and whether those circumstances were sufficient to produce such a conclusion was a matter for the jury exclusively. See *Emory v.*

Powder Co., 22 S. C. 484; Epstein *v.* Brown, 21 S. C. 599.

The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C.J., and MCGOWAN, J., concur.

When Ejected Passenger is Entitled to Exemplary Damages.—See Georgia R. Co. *v.* Homer, 27 Am. & Eng. R. R. Cas. 186; Philadelphia, etc. R. Co. *v.* Rice, 26 Ib. 264; Holmes *v.* Carolina Cent. R. Co., 26 Ib. 190; note, 195; Murphy *v.* Western, etc., R. Co., 21 Ib. 258.

SOUTHERN KANSAS R. Co.

v.

RICE.

(*Kansas Supreme Court, February 11, 1888.*)

Passengers—Wrongful Ejection—Measure of Damages.—Where a passenger is rightfully in a railroad car, in the possession of a ticket entitling him to ride on that trip and train, and is deporting himself in a becoming and proper manner, and presents his ticket to the conductor when called upon therefor, but is informed by the conductor that his ticket will not be honored, because the time to ride thereon has expired, and that he must either leave the train or pay his fare, and, not having any money, he does not pay the fare demanded, and thereupon the conductor takes hold of his coat collar, and leads him out of the car to the platform of the station; and when off the car a friend of his gives him money to pay the extra fare, and the conductor accepts the fare, and then permits him to ride to his destination, *held*, that even if the conductor acted in good faith, and in the honest belief that the passenger had no right to ride upon the ticket he presented, he is entitled to recover from the railroad company the amount of the extra fare paid by him, with interest, and also actual compensation for the injury and indignity to which he was subjected. *Held, further*, that if there was such a reckless indifference to the rights of the passenger as to establish gross negligence, amounting to wantonness, on the part of the conductor, in examining the ticket presented by the passenger, and in ejecting him from the car, he is also entitled to recover exemplary damages.

Same—Conductor—Scope of Authority—Liability of Company.—A conductor of a railroad company represents the company in the discharge of his functions; and being in the line of his duty in collecting the fare, or taking up tickets, the corporation is liable for any abuse of his authority, whether of omission or commission.

ERROR to District Court, Johnson County.

Action brought by Benjamin Rice against the Southern Kansas R. Co. on October 31, 1885, to recover as damages the sum of \$1,000 for being unlawfully assaulted and ejected from a passenger car by the conductor thereof while returning from Kansas City, Missouri, to Olathe, in this State; the plaintiff at the time having a ticket to ride as a passenger in the car. Subsequently the railroad company filed an answer containing a general denial. Trial had at the March term of the court for 1886. The jury returned a verdict for the plaintiff, and assessed his damages at \$117.46, and also made the following special findings of facts: "(1) Did the conductor act wilfully, and in a grossly negligent manner, in putting the defendant off the train? *Answer.* He wilfully put him off the train. (2) Did the conductor act with a reckless disregard to the plaintiff's rights? *A.* Yes. (3) Did the plaintiff state to the conductor that he had purchased his ticket the day before, and could the conductor have easily ascertained that fact from the passengers who were acquainted with plaintiff? *A.* In this case he could. (4) How much do you allow plaintiff as exemplary damages? *A.* \$71.75." "First. How much do you allow plaintiff for pecuniary loss? *A.* \$71. Second. Was plaintiff injured in person by the conductor? *A.* No. Third. How much do you allow plaintiff for injury to his person? *A.* Nothing. Fourth. Did plaintiff lose any time by reason of defendant's conductor refusing to honor his ticket, and if so, how much? *A.* No. Fifth. How much do you allow plaintiff for loss of time? *A.* Nothing. Sixth. How much do you allow plaintiff for inconvenience in going from his seat to the platform and back again? *A.* Nothing. Seventh. Was plaintiff treated in an insulting or brutal manner by the conductor? And if so, state fully how. *A.* An insulting manner. Eighth. How much, if anything, do you allow plaintiff for injury to his feelings? *A.* \$10.00. Ninth. How much, if anything, do you allow plaintiff for expenses, attorney's fees, or time in prosecuting this case? *A.* \$35.00." The defendant filed a motion to set aside the verdict of the jury, and for a new trial, which was overruled. Subsequently, judgment was entered upon the verdict. The railroad company excepted, and bring the case here.

Geo. R. Peck, A. A. Hurd, and F. R. Ogg for plaintiff in error.

John T. Little and Samuel T. Seaton for defendant in error.

HORTON, C. J.—On October 29, 1885; Benjamin Rice, a colored man purchased of the ticket agent of the Southern Kansas R. Co. at Olathe, in this state, for 50 cents, a limited

railroad ticket to Kansas City, Missouri, and return, good **Facts.** for three days; the date of issue being stamped on the back. On that day he was carried as a passenger by the railroad company upon one of the passenger trains from Olathe to Kansas City. The "going coupon" of the ticket was torn off, and taken up by the conductor of the train. On the next day, October 30th, Rice, desiring to return to Olathe, boarded one of the passenger trains of the company, which left Kansas City about 10 o'clock P. M., and when the conductor called upon him for his fare, presented the "return coupon" of the ticket, which he had purchased the day before. The conductor took it to the light, and, after examining it, handed it back to Rice, saying it was not good, and informed him that he could not honor it. Rice insisted that the ticket was good, and said to the conductor that he had purchased the ticket the day before, and that he (the conductor) had carried him upon the ticket to Kansas City on that day. Another passenger also stated to the conductor, at the time, that he had seen Rice purchase the ticket on the 29th. The conductor replied that he could not honor the ticket, and subsequently took hold of Rice's coat-collar and led him out of the car. Rice had no money to pay any extra fare; and when he was off the car, or about to get off, a friend gave him 75 cents, which he gave to the conductor, who returned him 5 cents, punched a receipt for his fare, and permitted him to ride to Olathe.

On the part of Rice, it is contended that the ticket he presented showed plainly on its back that it was stamped at Olathe on the 29th of October; that he told the conductor that he did not have any money to pay any more fare; that he was quietly in his seat as a passenger when ordered by the conductor to leave the train; that he did not make any forcible resistance to the orders of the conductor; but that the conductor took him out of the car, and off upon the steps of the platform. On the part of the railroad company, it is claimed that the ticket had been folded up and creased at the date; that the conductor took it to the light, and examined it carefully; that the date was obliterated; that the ticket looked so old and worn out that the conductor believed it had expired; that he informed Rice that the ticket was not good, and that he could not ride upon it, but would have to pay fare; that when the train reached Holliday, the conductor inquired of Rice what he was going to do; that Rice then refused to pay fare or get off the train; that the conductor then took hold of Rice's coat-collar, and led him to the platform of the station, or to the last step of the car; that then a friend told Rice to come back, and he would give him money

to pay his fare; the conductor permitted Rice to take his seat and ride to his destination; that, when Rice was informed he would have to pay his fare or leave the car, it was his duty to do one or the other; that he should have paid his fare, and relied upon his remedy to recover it back; that, if he could not do this, he should have quietly left the train, and not provoked or made necessary an assault; that therefore he should have recovered only 71 cents, that amount being the sum assessed by the jury for his pecuniary loss.

The railroad company asked instructions which tended to limit the amount of damages that Rice was entitled to recover to the exact fare paid by him, with interest thereon. **Instructions**

The court refused to give these instructions, but **to jury.** directed the jury, among other things, as follows: "I instruct you that if you find the plaintiff presented to the conductor for his passage a limited ticket, good only for three days from the date of its sale; and that the conductor, from the mutilated and worn condition of the ticket, was unable to read the date on the ticket, and honestly believed that the ticket was an old one, and not good; and for this reason, and without any unnecessary force or indignity to the plaintiff, required him to pay his fare or get off, and did, upon refusal and failure to pay fare, remove said plaintiff without any unnecessary force, and without injury to his person, to the platform of the car, or to the platform or ground at a regular station; and then plaintiff paid his fare, and continued his journey on the same train, and without delay,—then, if you find as a fact that the ticket presented by plaintiff was a good and valid ticket, and that the conductor had no right to collect this fare from the plaintiff, you must find a verdict for the plaintiff, and the measure of his damages would be the amount of fare paid by him, with interest at seven per cent. per annum from October 30th, 1885, and actual compensation for the injury and outrage, if any, suffered by plaintiff from the alleged assault."

We perceive no error in this instruction. In actions for the recovery of damages for the wrongful expulsion of a passenger from a train, the passenger may recover for his time, inconvenience, the necessary expenses to which he is subjected, and if treated with violence, or in an insulting manner, for the injuries to his person, and feelings. If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded. "There is a special duty on the carrier to protect its passengers, not only against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of its own servants; and for a breach of that duty it ought to be compelled to

Damages recoverable by ejected passengers.

make the amplest reparation. The law wisely and justly holds it to a strict and rigorous accountability. We would not relax in the slightest degree this strict accountability. We know that upon it, in no small degree, depends the safety and comfort of passengers." *Railway Co. v. Weaver*, 16 Kan. 456; *Railway Co. v. Kessler*, 18 Kan. 523. We fully concede that no one has a right to resort to force to compel the performance of a contract made with him by another; and a passenger about to be wrongfully expelled from a railroad train need not require force to be exerted to secure his rights, or increase his damages. For any breach of contract or gross negligence on the part of the conductor, or the other employes of a railroad company, redress must be sought in the courts, rather than by the strong arm of the person who thinks himself about to be deprived of his rights. A passenger should not be permitted to invite a wrong, and then complain of it. *Hall v. Rail Co.*, 15 Fed. Rep. 57; *Townsend v. Railroad Co.*, 56 N. Y. 301; *Bradshaw v. Railroad Co.*, 135 Mass. 409; s. c., 16 Am. & Eng. R. R. Cas. 386; *Railroad Co. v. Connell*, 112 Ill. 296; *Car Co. v. Reed*, 75 Ill. 125; 3 Wood, Ry. Law, § 364. Of course, a party upon a train may resist when, under the circumstances, resistance is necessary for the protection of his life, or to prevent probable serious injury; nor can a party be lawfully ejected from a train while in motion, so that his being put off would subject him to great peril. In this case Rice made no unreasonable resistance. He did not resort to force or violence. Having a good ticket, and being entitled to ride, he refused to pay fare or get off the train. The conductor had no difficulty in leading him off, and about all that Rice did was merely to assert his lawful right to ride upon the train. Where a passenger with a clear right and a clean ticket is entitled to ride on that trip and train, and is wrongfully ejected without forcible resistance upon his part, the jury are and ought to be, allowed great latitude in assessing damages. They should award liberal damages in full compensation for the injuries received. The quiet and peaceful behavior of a passenger is to his advantage, rather than to his detriment.

Complaint is also made of other instructions to the court regarding the measure of damages. Among other things, the court said to the jury that if the assault was malicious, and without cause or provocation, or was accompanied by acts of gross insult, outrage, or oppression, you may award the plaintiff exemplary or vindictive damages." Also, "that in estimating damages they might take into consideration the indignity, insult, and injury to plaintiff's feelings by be-

Other instructions as to measure of damages—Gross negligence and malice of conductor.

ing publicly expelled." Further, that if they found "there was on the part of the conductor either malice, gross negligence, or oppression, they would not be confined in fixing damages to the actual damages received, but were justified in giving exemplary damages." It is said that these instructions were misleading and erroneous, because there was no evidence whatever to show that the conductor acted with malice or gross negligence. Upon the evidence of Rice, corroborated by McCulloch, another passenger, who said that he saw Rice purchase the ticket on October 29th, there was evidence before the jury upon which to found these instructions. *Hufford v. Railroad Co. (Mich.)*, 28 Am. & Eng. R. R. Cas. 129, 31 N. W. Rep. 544. The forcible expulsion of Rice from the car where he was rightfully seated was such a wrong as is inevitably accompanied with more or less outrage and insult. There was no excuse for the act of expulsion, except the honest mistake or the gross negligence of the conductor. If that mistake was due to such reckless indifference to the rights of a passenger on the part of the conductor as established gross negligence, amounting to wantonness, and the jury so found, they might find exemplary damages. *Railroad Co. v. Kessler, supra*; *Railroad Co. v. Rice*, 10 Kan. 426. Whether the conductor was grossly negligent, amounting to wantonness, or actuated by malice, were matters before the jury, for their determination upon the evidence. Under the authority of *Titus v. Corkins*, 21 Kan. 722, Rice was entitled to recover the expenses incurred by him in the litigation, if entitled to exemplary damages. *Hall v. Railroad Co.*, 15 Fed. Rep. 95-97. The amount of the verdict in this case was only \$117.46; therefore the damages are not so excessive as to indicate passion or prejudice on the part of the jury. The other matters submitted are immaterial.

The judgment of the district court will be affirmed.

All the justices concurring.

Exemplary Damages for the Expulsion of Passengers.—See *ante*, *Hall v. South Carolina R. Co.*, 311, and note, 316.

DOW

v.

BEIDELMAN.

(125 U.S., 680.)

Fares—Regulation by Statute—Constitutionality.—Under a constitutional provision conferring upon the legislature power to alter or revoke charters thereafter granted, and to correct abuses and excessive charges by railroad companies, a statute limiting the maximum fare for the carriage of a passenger within a State to three cents a mile, is not a taking of property without due process of law within the meaning of the prohibition in the Federal constitution, in the case of a corporation reorganized on the sale of a railroad under a decree of foreclosure after the adoption of the State constitution, although the operation of the statute will reduce the net yearly income of the company to less than one and a half per cent on the original cost of the road, and only slightly over two per cent on the bonded debt, there being no evidence to show how much the bonds cost, or the amount of the capital stocks reorganized, or the sum paid for the road at the foreclosure sale.

Same—Classification of Companies—Length of Road.—A statute dividing railroad companies into classes, according to the length of the roads operated, and fixing a different limit for passenger fares for each class does not deny a corporation the equal protection of the laws within the meaning of the prohibition in the Federal constitution.

ERROR to the Supreme Court of the State of Arkansas.

Action by Beidelman against Dow, Matthews, and Moran, trustees, alleging that the defendants were the legal owners and in possession of the Memphis and Little Rock Railroad, in that State, more than a hundred miles long, and charged the plaintiff more than three cents a mile for a ticket between two stations twenty-three miles apart on the road, in violation of a statute of the State of April 4, 1887. The provisions of that statute are as follows, viz.:

SEC. 1. "The maximum sum which any corporation, officer of court, trustee, person or association of persons, operating a line of railroad in this State, shall be authorized to charge and collect for carrying each passenger over such line within this State, in the manner known as first class passage, is hereby fixed at the following named rates: On lines of railroad fifteen miles or less in length, eight cents per mile. On lines over fifteen miles in length and less than seventy-five miles in

length, five cents. On lines over seventy-five miles in length, three cents per mile."

SEC. 3. "Any of the persons or corporations mentioned in section one that shall charge, demand, take, or receive, from any person or persons aforesaid, any greater compensation for the transportation of passengers than is in this act allowed or prescribed, shall forfeit or pay for every such offence any sum not less than fifty dollars nor more than three hundred dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard, on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction." Acts of 1887, p. 227.

A jury was waived and the case submitted upon the following statement of facts:

"The Memphis and Little Rock R. Co. was incorporated under the act of the General Assembly of the State of Arkansas, approved January 11, 1853, which act is taken as a part hereof. See acts of 1852, p. 130.

"On May 1, 1860, it mortgaged its property to Samuel Tate, Robert C. Brinckley, and George C. Watkins, trustees. On March 1, 1871, it executed a second mortgage on its property and charter to Henry F. Vail, as trustee. On March 17, 1873, this second mortgage was foreclosed by sale under the power, and the purchasers, on November 17, 1873, organized a new company under the charter, which they called the Memphis and Little Rock Railway Company.

"On December 1, 1873, the Memphis and Little Rock R. Co. mortgaged its charter and property to certain trustees. This mortgage not being paid at maturity, the trustees thereunder brought suit in the United States circuit court for the Eastern District of Arkansas for its foreclosure, and the trustees in the mortgage of May 1, 1860, were, on their own application, made parties complainant; and on November 21, 1876, a final decree was entered in the cause, directing the foreclosure of both mortgages and a sale for their satisfaction.

"On April 27, 1877, the mortgaged property was sold under the decree, including the charter, and the purchasers at the sale organized under the charter, and called the new company the Memphis and Little Rock Railroad Company, as reorganized. On May 1 and 2, 1877, the said last-named company issued bonds and executed to the defendants its mortgage upon its property and charter, and, default having been made in their payment, the defendants are in possession as trustees for the mortgage bondholders.

"The legal right of the successive companies to organize under the old charter is not admitted.

"The railroad was built, prior to 1868, from Memphis to Madison and from Little Rock to Du Vall's Bluff. It was built through the intervening distance in 1869. The expense of constructing the Memphis and Little Rock railroad was \$4,000,000, and the railroad company has a bonded indebtedness of \$2,850,000, bearing interest at eight per cent per annum; and the defendants are in possession as the representatives of the mortgage bondholders, default having been made in the payment of interest on the bonds. The net income of the road for the year 1886 was \$162,000, earned principally from passenger traffic, the charge for transportation having been five cents per mile; and this has been about the average for recent past years. With the same traffic that the road has now, and charging for transportation at the rate of three cents per mile, the net income will only be \$58,000, which will pay less than one and one half per cent on the cost of the road, and only a little over two per cent on its bonded indebtedness. The defendants do not anticipate any increase of traffic on account of the reduction, for the reason that the St. Louis, Iron Mountain, and Southern Railway, from which the Memphis and Little Rock Railroad derives nearly all of its through business, is building a parallel branch from Bald Knob in the State of Arkansas to the city of Memphis, and, being a hostile and rival line to that of these defendants, will carry over that branch the through passengers who would otherwise go over the road of the defendants. The most profitable traffic has been the through traffic, and the defendants anticipate a great diminution in their present traffic when said branch is completed, and it will to all appearances, be completed during the summer of 1887.

"The length of the defendant's road is one hundred and thirty-five miles. Forty miles of that distance, from Madison to Memphis, is through a swamp, in which there are virtually no inhabitants, and which is subject to overflow.

"Either party may refer to the statements in reference to the railroads in Arkansas contained in Poor's Railroad Manual for 1886, and the same shall be taken as evidence of the facts therein stated.

"The cost of constructing the Batesville and Brinkley Railroad from Brinkley to Newport, a distance of sixty miles, has been \$375,000. Its rate of transportation before the act of 1887 was five cents per mile. Its length is sixty miles. The Arkansas and Louisiana Railroad is twenty-five miles long and its cost is \$180,000.

"It is further agreed that in Arkansas money is now and

has been for twenty years past lending currently at interest from six to ten per cent per annum."

"The following statements in Poor's Railroad Manual for 1886 were introduced in evidence under the agreed statement of facts, viz.:

"Net earnings of Batesville and Brinkley Railroad for 1885, \$29,163.25.

"Net earnings of the Arkansas and Louisiana Railroad for 1855, \$34,429.88.

"Length of St. Louis, Iron Mountain, and Southern Railway, 923 miles. Mortgaged for \$35,564,352.61; 5, 7, and 8 per cent. Net earnings, \$3,619,416.63. Rate of charges has been three cents per mile.

"Length of the Little Rock and Fort Smith Railroad, 165 miles. Mortgaged for \$2,379,500; 7 per cent. Net profits, \$225,910.31. Rate of charges has been five cents per mile.

"Length of the Little Rock, Mississippi River, and Texas Railway, 162 miles. Mortgaged for \$2,977,500; 7 per cent. Net earnings, \$99,604.44. Rate of charges has been five cents per mile.

"Length of the St. Louis, Arkansas, and Texas Railway, 735.21 miles. Mortgaged for \$18,375,000; 6 per cent. Net earnings, \$67,644.30.

"Length of St. Louis and San Francisco Railroad, 814.88 miles. Mortgaged for \$26,026,000. Net earnings, \$2,573,772.70.

"Length of Kansas City, Springfield, and Memphis Railway, 281.94 miles. Mortgaged for \$7,800,000; 6 per cent. Net earnings, \$365,160.88."

No other evidence was introduced.

The defendants asked the court to find as follows:

"First. The act of the General Assembly of the State of Arkansas, approved April 4, 1887, in so far as it relates to the present proceeding, is unconstitutional, null, and void, because under the guise of regulating charges for the carriage of passengers on railroads, it amounts virtually to the confiscation of the property of the railroad in the hands of said defendants.

"Second. The said act of the general assembly is unconstitutional, because it is special legislation and makes arbitrary discriminations between different railroads, not based either upon their value, their earnings, or other valid grounds, but based simply on the respective lengths of the several railroads."

But the court refused to make either of those declarations of law, and gave judgment for the plaintiff for a penalty of fifty dollars and a counsel of fee of twenty-five dollars. The

defendants appealed to the supreme court of the State, which affirmed the judgment, and therefore, the defendants sued out this writ of error.

Mr. U. M. Rose for plaintiff in error.

Mr. John H. Rogers for defendant in error.

GRAY, J.—The general rule of law that governs this case has been clearly stated and developed in opinions of this court, delivered by the late chief justice.

In *Munn v. Illinois*, 94 U. S. 113, decided at October term, 1876, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," the chief justice said: "To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." 94 U. S. 133, 134.

In *Chicago, Burlington & Quincy Railroad v. Iowa*, 94 U. S. 155, decided at the same time, a corporation having a perpetual lease of the railroad of another organized under the general corporation law of Iowa of 1851, c. 43, with the same powers as private individuals to make contracts, as well as the power to establish by-laws and make all rules and regulations deemed expedient for the management of its affairs, in accordance with law, was held to be bound by the subsequent statute of Iowa of 1874, c. 68, entitled "An act to establish reasonable maximum rates of charges for transportation of freight and passengers on the different railroads of this State," by which those railroads were classified according to the gross amount of their earnings per mile for the preceding year; and the compensation per mile, which those of each class might receive for the transportation of a passenger with ordinary baggage, was limited to three cents, three cents and a half, and four cents, respectively. Iowa laws of 1874, p. 61. The chief justice said: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may better serve the public in that capacity. They are, therefore, engaged in a public employment affecting a public interest, and, under the decision

The *Munn* case reviewed.

Chicago, B. & Q. R. Co. v. Iowa examined.

in *Munn. v. Illinois*, 94 U. S. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters." "This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business." 94 U. S. 161, 162.

The same rule was affirmed and acted on in several other cases decided at the same time, in the first of which the chief justice, in answering "the claim that the courts must decide what is reasonable, and not the legislature," said:

"Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been im-

Legislature decides what is reasonable.

properly fixed, the legislature, not the courts, must be appealed to for the change." *Peik v. Chicago & Northwestern Railway*, 94 U. S. 164, 178; *Chicago, Milwaukee & St. Paul Railroad v. Ackley*, 94 U. S. 179; *Winona & St. Peter Railroad v. Blake*, 94 U. S. 180; *Stone v. Wisconsin*, 94 U. S. 181.

Upon like grounds, in *Ruggles v. Illinois*, 108 U. S. 526; s. c., 11 Am. & Eng. R. R. Cas. 59; and *Illinois Central Railroad v. Illinois*, 108 U. S. 541; s. c., 11 Am. & Eng. R. R. Cas. 55, decided at October Term, 1882, the statute of Illinois of April 15, 1871 (Illinois Laws of 1871, p. 640), which

Ruggles v. Illinois, and Ill. Cent. R. Co. v. Illinois.

classified the railroads in the State according to their gross annual earnings per mile, and put different limits on the compensation of the different classes per mile for carrying a passenger and his baggage, was adjudged, in opinions delivered by the chief justice, to be constitutional and valid, in restricting to the limit of three cents a mile existing corporations, whose charters gave them power to make all by-laws, rules and regulations not repugnant to law, and gave their directors power to establish such rates of toll as they should by their by-laws determine. And two justices who did not assent to those opinions concurred in the judgments, because it was not shown that the rate prescribed by the legislature was unreasonable.

In *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; s. c.,

23 Am. & Eng. R. R. Cas. 577, decided at October Term, 1885, the obligation of a contract, created by a charter granting similar powers to a railroad corporation and its directors, was held not to be impaired by a statute of Mississippi, establishing a board of railroad commissioners charged with the duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State; and the chief justice said: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." 116 U. S. 325. He added, however: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law." 116 U. S. 331. The opinions of the two dissenting justices were grounded upon the provisions of the charter, and upon its not having been expressly made subject to alteration or repeal by the legislature. The cases, decided at the same time, of *Stone v. Illinois Central Railroad*, 116 U. S. 347; s. c., 23 Am. & Eng. R. R. Cas. 597; and *Stone v. New Orleans & Northeastern Railroad*, 116 U. S. 352; s. c., 23 Am. & Eng. R. R. Cas. 606, were substantially similar.

As applied to freights and fares for transportation not extending beyond the limits of the State by which the railroad company is incorporated, the authority of the legislature is not affected by the later decision in *Wabash, St. Louis & Pacific Railway v. Illinois*, 118 U. S. 557; s. c., 26 Am. & Eng. R. R. Cas. 1.

The case at bar is quite clear of any of the questions upon which the members of the court have heretofore differed in opinion.

If the Memphis and Little Rock R. Co., as re-organized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the State of Arkansas, it was not the same corporation as that chartered by the legislature in 1853, but was a new corporation, subject to the provisions of the constitution and laws in force when it first

Stone v. Farmers' Loan and Trust Co.

Reorganized road a new corporation.

came into existence, that is to say, in 1877. *Memphis & Little Rock Railroad v. Railroad Commissioners*, 112 U. S. 609.

The constitution of Arkansas of 1874 contains the following provisions:

“Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The general assembly shall have power to alter, re-
voke or annul any charter of incorporation now ex-
isting and revocable at the adoption of this consti-
tution, or that may be hereafter created, whenever,
in their opinion, it may be injurious to the citizens of the
State, in such manner, however, that no injustice shall be
done to the corporators. Art. 12, § 6.

Arkansas con-
stitutional
provisions.

“The general assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroad, canal and turnpike companies, for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures.” Art. 17, § 10.

The legislature of Arkansas, by the statute of April 4, 1887, fixed the maximum fare that any corporation, trustees, or persons, operating a line of railroad, might charge and collect for carrying a passenger within the
State, at eight cents a mile on a line fifteen miles
long or less, five cents a mile on a line more than fifteen and
less than seventy-five miles long, and three cents a mile on a
line more than seventy miles long. The line of the road of the
plaintiffs in error is more than seventy-five miles long, and
they charged more than three cents a mile, and were there-
fore held to be subject to the penalty imposed by the statute
for any violation of its provisions.

Act of the leg-
islature.

The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that
it is so in this case, by reason of the admitted fact,
that with the same traffic that their road has now,
and charging for transportation at the rate of
three cents per mile, the net yearly income will
pay less than one and a half per cent on the original cost of
the road, and only a little more than two per cent on the
amount of its bonded debt. But there is no evidence what-
ever as to how much money the bonds cost, or as to the
amount of the capital stock of the corporation as reorganized,
or as to the sum paid for the road by that corporation or its
trustees. It certainly cannot be presumed that the price
paid at the sale under the decree of foreclosure equalled the
original cost of the road, or the amount of outstanding

Contention
that restriction
is unreason-
able — Reduced
income.

bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.

It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws.

The legislature in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.

A similar question was presented and decided in Chicago, *Burlington & Quincy Railroad v. Iowa*, above cited. It was there objected that a statute regulating the rate for the carriage of passengers, by different classes of railroads, according to their gross earnings per mile, was in conflict with art. 1, sec. 4, of the constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and "the general assembly shall not grant to any citizen or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." In answering that objection, the chief justice said: "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires." "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the

common good requires that it should be done.” 94 U. S. 163, 164.

Judgment affirmed.

INTERNATIONAL AND GREAT NORTHERN R. Co.

v.

WILKES.

(*Texas Supreme Court, October, 18, 1886.*)

Passengers—Production of Ticket—Reasonable Time.—The conductor of a passenger train is bound to wait a reasonable time after a request for a passenger's ticket to enable him to produce it; and what is a reasonable time therefor is a question for the jury.

Same—Verdict—Sufficiency of Evidence.—A passenger who had a ticket in his possession, on the conductor's demand for it, searched for it, but was unable to find it immediately. He informed the conductor that he had a ticket and would find it in a minute and give it to him. He also stated that he had exhibited it to the brakeman on entering the train. The conductor did not wait, but immediately stopped the train between two stations twelve and one-half miles apart, and ordered the passenger to leave the train, at the same time making demonstrations of using force. The passenger found the ticket almost immediately after being ejected. *Held*, that upon the evidence, the jury were justified in finding that the conductor had not waited a reasonable time for the production of the ticket.

Same—Ejection—Damages.—The passenger after leaving the train walked back to the station where he had entered it. It was midnight, and the night was dark. He crossed a railroad bridge over a river half a mile long, and arrived at the station about an hour and a half after he had left it upon the train. As a consequence of his ejection, he became sick, lost his two weeks' work and had a doctor in attendance upon him. In an action against the company to recover damages, *held*, that a verdict of \$500 was not excessive.

APPEAL from District Court, Gregg County.

Action to recover damages for the wrongful expulsion of plaintiff from one of defendant's trains. Defendant appeals from a judgment for \$350 entered upon a verdict for plaintiff for \$500, and, a remittitur entered upon the suggestion of the court.

F. H. Pendergast for appellant.

R. B. Levy, Jr., for appellee.

WILLIE, C.J.—The plaintiff below purchased a ticket entitling him to be transported on the defendant's railroad from Longview to Gilgore, a distance of about 12½ miles.

Facts.

He boarded the proper train, after exhibiting his ticket to the brakeman who stood at the door, then placed the ticket in his vest pocket, and took his seat in the car. When the conductor came around to collect tickets, the plaintiff felt in his vest-pocket for his, but could not find it at the moment. While searching for the ticket, he told the conductor that he had a ticket, and that it was somewhere about his clothing, and to wait a minute or so, and he would find it, and give it to him. The conductor replied, impatiently: "If you have a ticket, it need not take you all night to get it. You must get the ticket or get off;" and immediately pulled the bell-cord to stop the train. The plaintiff then told him that the brakeman had seen his ticket, and that he could call his brakeman and ask him. He did not call the brakeman, but again told the plaintiff to get off; remarking, at the same time, that persons had tried to play that on him before. Plaintiff then offered to pay his fare to the extent of the change that he had in his pocket, but this being only 45 cents, and the fare being 50 cents, the conductor would not receive it; and in spite of the request of the plaintiff to wait a reasonable time for him to find his ticket, the conductor stopped the train, and ordered him off; an order which he obeyed, the conductor making demonstrations of using force to carry out his command. The train then pulled out, leaving the plaintiff in the woods near a water-tank, and at a place where there were no residences. The plaintiff, just after the train left, found his ticket, which had slipped through a hole in his pocket, and got in next to the lining of his vest. It was about a minute and a half between the time the conductor called for the ticket and the time at which he ejected the plaintiff from the cars. All this occurred after midnight, and the night was dark, and the place swampy; and the plaintiff, not knowing what distance he was from either Longview or Kilgore, walked back to the former, crossing a railroad bridge over the Sabine river half a mile long, and arriving at Longview about an hour and a half after he had left that place on the train. As a consequence of these facts he became sick, and lost two weeks from work, and had a doctor in attendance on him. For the mortification suffered by him in being ordered off the train in the presence of the other passengers in manner as stated, and the pain of mind and body, loss of time, and expenses to which he was subjected by reason of being put off the cars, and forced to walk to Longview, he claimed damages to the extent of \$10,000. The jury rendered a ver-

dict in his favor for \$500, and a motion for a new trial having been filed upon the ground, among others, that the damages found by the jury were excessive, his counsel remitted \$150, and the court rendered judgment for the balance. From that judgment this appeal is taken.

It is not disputed by the appellant that the conductor was bound to wait a reasonable time for the plaintiff to produce his ticket, but it is claimed that he complied with this requirement of the law. This was a question of fact for the jury, and, under a charge not complained of, they found it in favor of the plaintiff, and we cannot say that their finding is not in accord with the evidence. What would have been reasonable time depends upon the circumstances of the case. The only fact which would have authorized an immediate expulsion of the plaintiff was a positive refusal to produce a ticket or pay fare. There was no such refusal; on the contrary, the plaintiff told the conductor that he had a ticket about his clothing, and would find it in a minute or two and give it to him. This was a statement of something that might frequently happen,—the placing of a ticket in some part of the clothing where it could not be readily found. If true, and he found the ticket, he was entitled to all the rights of a passenger; if not true, its falsity could soon be demonstrated. The conductor had no reason to suppose it false; for, if the plaintiff intended to ride to the next depot without paying fare, the delay of a few moments under pretense of looking for his ticket would not have furthered his object. He also offered to prove by the brakeman that he had shown him his ticket when getting on the car. While the conductor was not bound to receive this as proof that the plaintiff had a ticket, it should have convinced him that his assertion to that effect was in good faith, since, if not true, the brakeman was there to disprove it. But the conductor seems to have treated the statement as false the moment it was made, and the defendant as a trespasser, and to have allowed but little more time to search for his ticket than was consumed in stopping the train, and hurrying the plaintiff from the car. That the latter did have a ticket, and would have found it had he been allowed but a moment longer for the search, was shown by the fact that he did find it in his clothing immediately after the train moved off, and this occurred as soon as he was ejected. We think the conductor acted too hastily, and the jury were justified in so finding. *Maples v. Railroad Co.*, 38 Conn. 557; *Hayes v. Railroad Co.*, 18 Am. & Eng. R. R. Cas. 363; *Clark v. Railroad Co.*, Id. 366.

Lost ticket—
Conductor
bound to wait
reasonable
time.

The second assigned error is virtually disposed of by what

we have already said. It complains that the plaintiff was negligent in not being able to produce the ticket when called, or pay the 50 cents demanded.

The third and last assignment is: "The court erred in refusing a new trial, because the verdict is excessive in amount, and the *remittitur* does not obviate the objection, but confesses it." Had the *remittitur* not been entered,

Excessive
damages—Re-
mittitur.

and the court had approved the verdict by overruling the motion for a new trial, we could not have reversed on the ground that the verdict was excessive. Taking into view the mortification caused by the several indignities heaped upon the appellee in the presence of his fellow-passengers, the mental and physical pain produced by his being left about midnight of a dark night in the woods, where there was no one living, and by his long and dangerous walk to Longview, his consequent illness, lasting two weeks, also his losses from inability to labor during that period of time, we cannot say that \$500 was too great a compensation. Indeed, this amount seems small as compared with the sums usually rendered by juries in similar cases, and which have been approved both by the *nisi prius* courts and those of last resort. In *Railway Co. v. Fixe*, 11 Am. & Eng. R. R. Cas. 109, \$600 was held no more than reasonable compensation for less injuries than those suffered by the appellee in this case, the facts of the two cases being much alike. This court, too, in the case of *Railway Co. v. Gilbert*, 64 Tex. 536, sustained a verdict of \$6500; and in *Railroad Co. v. Smith* (Tyler term, 1886), 1 S. W. Rep. 565, sustained one for \$8000 for a transaction and consequent injuries similar to the present; the principal difference in the cases being that in those the injured parties were females, travelling, unprotected, with young children.

There are no circumstances in this case tending to show that the jury were actuated by passion or prejudice in assessing damages. Neither does it appear that the trial judge regarded the verdict as excessive. He did not intimate that he would set it aside if a *remittitur* was not entered, but this entry was the voluntary act of the plaintiff's attorney. Those cases which hold that a *remittitur* cannot be entered where the true amount of damages cannot be ascertained from the evidence rest upon the ground that an excessive verdict shows that the jury did not pay due regard to the evidence, but were actuated by passion or prejudice in coming to their conclusion; and that to allow a *remittitur* of a part of the damages would be to substitute the finding of the court for that of the jury. But where, as in this case, the damages are not excessive, and there is no proof of improper motives on the

part of the jury, the rule loses its application, and the court gives judgment for a sum which the jury honestly thought the plaintiff should recover.

Nor are the decisions of our own state opposed to this view, as supposed by appellant's counsel. In *Thomas v. Womack*, 13 Tex. 580, a case of assault and battery, where the plaintiff recovered \$10,000 damages, and remitted \$8500, the judge refused a new trial on the express ground that the *remittitur* had been entered; thereby, in effect, holding that, had it not been entered, a new trial would have been granted. In *Hardeman v. Morgan*, 48 Tex. 103, the *remittitur* was entered after the district judge had stated that, if the defendant would remit the damages recovered by him in reconvention, the motion for a new trial would be overruled. This court intimated that, under the decision in *Thomas v. Womack*, which was in point, the damages could not be remitted, but declined to make any authoritative decision upon the subject. In *Hughes v. Brooks*, 36 Tex. 379, and in *Heidenheimer v. Schlett*, 63 Tex. 395, exemplary and actual damages were mingled, and not separated in the verdict. In the latter case, too, the *remittitur* was suggested by the court. This court there said: "The amount remitted was evidently considered by the court as exemplary damages embraced in the general finding, and the court, and not the jury, estimated the actual damages at the amount remaining after the *remittitur* was entered. Having held that it was not a case for exemplary damages, and there being nothing before the court from which the exact amount of each class of damages could be arrived at, it was of course error for the district judge to separate them, and say how much actual damages should be recovered." In *Hoskins v. Huling*, 4 Tex. Law Rev. 183, the trial judge held the verdict excessive, and the appellee thereupon remitted portions of the recovery, and a new trial was ordered. The court of appeals held this action unauthorized.

Thus we see that in each of these cases the trial court regarded the verdict originally found as excessive, and suggested a *remittitur* to prevent the grant of, or overruled a motion for, a new trial, because a *remittitur* had been entered, or exemplary damages were so commingled with actual damages that they could not be distinguished from each other, so that the former might be remitted, and the latter allowed to stand. Here, neither exemplary damages were recovered, nor did the court overrule the motion for a new trial for the reason that a portion of the recovery had been remitted. Hence neither of the above decisions is applicable to the case in hand. But the case of *Cotton Press Co. v. Crowly* (decided at Galveston term, 1886) is directly in point.

There, a father recovered damages for the death of his infant child, caused by the negligence of the press company, to the amount of \$3500. The plaintiff's attorney voluntarily remitted \$1800 of the verdict. The court below refused a new trial, and its action was sustained by this court. It was stated in the opinion that the damages were in some measure conjectural, yet we said: "Unless the verdict appeared clearly to be excessive, the fact that a *remittitur* was entered could not interfere with the right of the appellee to have a judgment for a less sum than given by the verdict." And so with this case. The plaintiff's original recovery was not excessive, under the evidence, and there is no reason why a judgment for a less sum should be disturbed. If it was the deliberate and unprejudiced opinion of the jury that the plaintiff was damaged in the sum of \$500, they certainly thought that he was damaged to the extent of \$350, so that the finding is at last theirs, and not that of the court. The attorney may have remitted through fear that the court would consider the verdict excessive, but the record does not show that this was the opinion of the judge, and we have no right to attribute such an opinion to him.

We find no error in the judgment, and it is affirmed.

Lost Ticket—Expulsion of Passenger for Failure to Produce.—See *Butler v. Manchester, etc., R. Co.*, 33 Am. & Eng. R. R. Cas. 551; note, 556.

Conductor must Give Passenger Reasonable Time to Find Ticket.—*Hayes v. New York, etc., R. Co.*, 18 Am. & Eng. R. R. Cas. 363; note, 365; *Clark v. Wilmington, etc., R. Co.*, 18 Ib. 366; note, 370.

BOSTON AND MAINE R. Co.

v.

CHIPMAN.

(*Massachusetts Supreme Judicial Court, January 19, 1888.*)

Passengers—Commutation Tickets—Conditions—Detached Coupons.—A stipulation on the sale of a book of commutation tickets evidenced by the book and the coupons therein, that such coupons shall not be valid unless detached in the presence of or by the conductor is reasonable and valid.

ON report from Superior Court of Suffolk County.

Action of contract to recover a fare for transporting defendant upon train of plaintiff's company between Boston and Melrose Highlands. Trial by the superior court without a jury. It was admitted by the parties that the established fare between Boston and Melrose Highlands for passengers paying fares upon plaintiff's trains was 29 cents, and that the amount was reasonable; and that the defendant travelled upon the plaintiff's train, and on being asked for his fare offered a coupon which he had detached from a book containing coupons. The outside cover of the book bore the inscription Boston & Melrose Highlands; and on the inside cover was printed:

"One Hundred-Ride Ticket, Boston & Maine Railroad; good for one ride, and an additional ride for each coupon attached, between Boston and Melrose Highlands. Continuous passage. Coupons to be detached by conductor only. "1200. D. T. FLANDERS, Gen. Ticket Agent."

Each coupon was of the form following:

"B. & M. R. R.
"I (1200) II
"Not good if detached."

Upon the third passage of the cover was printed: "NOTICE TO PASSENGERS. Passengers will please take notice that the coupons attached hereto are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket."

The holder of the book and coupons was entitled to travel 100 times between Boston & Melrose Highlands, and the price charged for such books was less than the price of 100 separate mile tickets between the same points. It was also admitted that conductor refused to accept the detached coupon as fare, unless the defendant exhibited the book, but the defendant declined to do so, and refused to pay his fare in any other manner. Evidence was offered on behalf of the defendant that he himself and many others had been allowed to travel upon detached coupons; but this testimony we excluded. The court found for the plaintiff for 29 cents upon the facts admitted, and reported the case to the supreme judicial court.

E. R. Anderson for defendant.

S. Lincoln for plaintiff.

BY THE COURT. The contract, of which the book and the coupons therein, sold to the defendant by the plaintiff, are

the evidence, is a reasonable and valid one. Under it the plaintiff's conductor was not required to accept as the defendant's fare a detached coupon, and had at least the right to demand that he should produce and show the book. There was no evidence which would justify the finding that the plaintiff had rescinded or waived any of the conditions or terms of the contract. Judgment for plaintiff.

Coupons Void if Detached—Reasonable Condition.—A condition in a book of commutation tickets that coupons shall not be good if detached, is reasonable and valid. *Norfolk & W. R. Co. v. Wysor*, 26 Am. & Eng. R. R. Cas. 235.

Refusal to Allow Conductor to Detach.—A traveller, travelling upon a commutation ticket which provides that the coupon shall be void unless detached by the conductor, technically violates the contract by detaching them himself. If, while detaching the coupons the conductor call his attention to the fact that it is his duty to detach them, the passenger should desist, and hand the ticket and coupons to the conductor, and it will then be the duty of the latter, if he saw the coupons detached, or could readily ascertain that they had been detached from the ticket, to accept them. But the conductor will not be bound to receive the detached coupons without seeing the ticket. *Louisville N. & G. S. R. Co. v. Harris*, 9 Lea (Tenn.), 180; s. c., 16 Am. & Eng. R. R. Cas. 374. Under such a condition if the passenger refuses to allow the conductor to detach the coupons, and insists upon detaching them himself, he may be ejected from the train. *Norfolk & W. R. Co. v. Wysor*, 26 Am. & Eng. R. R. Cas. 235; especially when he also refuses to exhibit the book to enable the conductor to ascertain whether the coupons had been recently detached, and the passenger had a right to travel on them. *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea (Tenn.), 180; s. c., 16 Am. & Eng. R. R. Cas. 374.

Ejection for Failing to Exhibit.—If a commutation ticket contain a condition that it shall be exhibited on each journey, the passenger may be ejected if he attempts to travel without it, although the conductor knew that he had purchased a commutation ticket, and the passenger explained that he had left it at home by mistake. *Downs v. New York & N. H. R. Co.*, 36 Conn. 278; s. c., 4 Am. Rep. 77. So too he may be ejected if he has lost it, and refuse to pay the regular fare. *Crawford v. Cincinnati, H. & D. R. Co.*, 26 Ohio St. 580. A passenger offered detached coupons for his fare, and was arrested for fraudulently evading payment. In an action for false imprisonment, it was held that evidence that plaintiff had frequently seen the conductor accept similar coupons under similar circumstances, was inadmissible, except to prove a custom. *Marshall v. Boston & A. R. Co.*, 145 Mass. 164; s. c., 31 Am. & Eng. R. R. Cas. 18.

See *Butler v. Manchester & L. R. Co.*, 33 Am. & Eng. R. R. Cas. 551, note 556.

MOSHER

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(127 U. S. 390.)

Passenger—Limited Ticket—Identification of Holder—Connecting Lines.
—A railroad company sold a round-trip ticket at a reduced rate which was available for a point beyond its own line over the connecting line of another company. The ticket contained among others the following conditions, viz.: that the company issuing it was not responsible beyond its own line, and acted only as agent for the other company; that the purchaser should within the time limited identify himself to the agent of the connecting line at the point of destination, and should have the ticket stamped by him; that without such identification and stamp the ticket should not be available for the return journey; and that no agent or employee of any of the lines should have power to waive any of the conditions. The purchaser within the time limited presented himself for identification at the proper office; but owing to the absence of the agent, could not have himself identified and the ticket stamped. He proceeded on his return journey, and on reaching the line of the company which issued the ticket, the conductor refused to accept it, and ejected him from the train, although he stated the reason that the ticket was not stamped and offered to identify himself to the conductor in the manner required by the ticket. *Held*, that the passenger could not maintain an action against the company selling the ticket, such company not being responsible by the terms of the contract for the absence of the officer of the connecting company.

ERROK to the Circuit Court for the Eastern District of Missouri.

This was an action by a passenger against a railroad corporation for putting him off one of its trains. The allegations of the amended petition were in substance as follows:

On April 9, 1883, the plaintiff purchased of the defendant at St. Louis a ticket expressed on its face to be "good for one first-class passage to Hot Springs, Ark., and return when officially stamped on back hereof and presented with coupons attached," and containing a "tourist's contract," signed by the plaintiff as well as by the ticket agent, by which, "in consideration of the reduced rate at which this ticket is sold," the plaintiff agreed, "with the several companies" over whose lines the ticket entitled him to be carried, upon certain terms

and conditions, of which those material to be here stated were as follows :

" 1st. That in selling this ticket the St. Louis, Iron Mountain and Southern R. Co. acts only as agent and is not responsible beyond its own line."

" 4th. That it is good for going passage only five (5) days from the date of sale, as stamped on back and written below.

" 5th. That it is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within eighty-five (85) days from date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five (5) days from such date.

" 6th. That I, the original purchaser, hereby agree to sign my name and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads, and on my failure or refusal that this ticket shall become thereafter void."

" 12th. And it is expressly agreed and understood by me that no agent or employee of any of the lines named in this ticket has any power to alter, modify or waive in any manner any of the conditions named in this contract."

Attached to the ticket were various coupons, a portion of which entitled the plaintiff to be carried from Malvern to Hot Springs and back on the Hot Springs Railroad. The plaintiff was accordingly carried as a passenger from St. Louis to Hot Springs.

On May 9, 1883, the plaintiff, desiring to return to St. Louis, "presented himself and said ticket at the business and ticket office and depot of said Hot Springs Railroad, the said business and ticket office and depot being then and there the business office of the authorized agent of said Hot Springs Railroad at said Hot Springs, during business hours and a reasonable time before the time of departure of its train for St. Louis that the plaintiff desired to take and did take," and offered to identify himself as the original purchaser of the ticket to the satisfaction of said agent, for the purpose of entitling himself to return thereon to St. Louis, and of permitting the ticket to be officially signed, dated in ink and duly stamped by said agent; but the defendant and the Hot Springs R. Co. failed to have said agent there at any time between the time when the plaintiff so presented himself and his ticket and the time of departure of the train, "whereby," the petition averred, "said defendant and its agent and the agent of said Hot Springs Railroad at Hot Springs, Ark., failed and refused, without any just cause or excuse, to identify

the plaintiff as the original purchaser of said ticket, or to officially sign, date in ink and stamp said ticket."

The plaintiff thereupon boarded the train of the Hot Springs Railroad at Hot Springs, and was carried thereby to Malvern, where, on the same day, he boarded a regular passenger train of the defendant for St. Louis, and, upon the conductor thereof demanding his fare, presented his ticket, informed him of his presentation of it at the office at Hot Springs, of his offer there to identify himself, and of the absence of the agent, as aforesaid, and offered to sign his name and otherwise identify himself to the conductor, and demanded to be carried to St. Louis by virtue of said ticket; but the conductor refused, and put him off the train, and left him at a way station, where he was obliged to remain without fire or other protection against the cold until he took the midnight train of the defendant for St. Louis, first paying fare; "by reason of each and all of which wrongful and unlawful acts aforesaid of defendant, its agents and employees, the plaintiff says he has been damaged in the sum of ten thousand dollars, for which he asks judgment."

The circuit court sustained a demurrer to this petition, and gave judgment for the defendant. Its opinion, delivered upon sustaining this demurrer and sent up with the record, is reported in 23 Fed. Rep. 326, and 21 Am. & Eng. R. R. Cas. 283; and its opinion at a former stage of the case, in 5 McCrary, 462, and in 17 Fed. Rep. 880.

Mr. Clinton Rowell for plaintiff in error.

Mr. Winslow S. Pierce, Jr., and *Mr. John F. Dillon* for defendant in error.

GRAY, J.—The right of this plaintiff to be carried upon the defendant's train, without paying additional fare, does not depend upon his having been received as an ordinary passenger, or upon any representations made by a ticket-seller, conductor or other officer of the company as to his right to use a ticket, but wholly upon the construction and effect of the written contract, signed by him, upon the face of the ticket (of the kind called "tourist's" or "round-trip" tickets) sold him by the defendant for a passage to Hot Springs and back, by which, in consideration of a reduced rate of fare, he agreed to the following terms:

Plaintiff's
right de-
pends on
ticket—Its
terms.

By the fifth condition, the ticket "is not good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within eighty-five days

from date of sale, and when officially signed and dated in ink and duly stamped by said agent this ticket shall then be good only five days from such date."

The clear meaning of this condition is that the ticket shall not be good for a return passage at all, unless, within eighty-five days from its original date, the holder not only identifies himself as the original purchaser to the satisfaction of the agent named, but that agent signs, dates, and stamps the ticket; and that, upon such identification and stamping, the ticket shall be good for five days from the new date.

The sixth condition, by which the ticket is to be void if the plaintiff does not sign his name and otherwise identify himself, whenever called upon so to do by any conductor or agent of either of the lines over which he may pass, is evidently intended as an additional precaution against a transfer of the ticket either in going or in returning, and not as an alternative or substitute for the previous condition to the validity of the ticket for a return trip.

The twelfth condition states that the plaintiff understands and expressly agrees that no agent or employee of any of the lines has any power to alter, modify, or waive any of the conditions of the contract.

By the express contract between the parties, therefore, the plaintiff had no right to a return passage under the ticket, unless it bore the stamp of the agent at Hot Springs. Such a stamp was made by the contract a condition precedent to the right to a return passage, and no agent or employee of the defendant was authorized to waive that condition.

The plaintiff contends that, as there was no agent at the office at Hot Springs, to whose satisfaction he could identify himself, and by whom he could have his ticket stamped, when he presented himself with his ticket at that office, within a reasonable time before he took the return train, he had the right to be carried from Hot Springs to St. Louis under his ticket, without having it stamped, and may therefore maintain this action against the defendant for the act of its conductor in expelling him from the connecting train upon the defendant's road.

If this defendant had been the party responsible for not having an agent at Hot Springs, the question thus presented would have been of some difficulty, although we are not prepared to hold that, even under such circumstances, the plaintiff's remedy would not be limited to an action for the breach of the implied contract to have an agent there, and to the expense which he thereby incurred. But this case does not require the expression of any opinion upon that question.

By the first condition of the contract contained in the plaintiff's ticket, the defendant is not responsible beyond its own line. Consequently it was not responsible to the plaintiff for failing to have an agent at the further end of the Hot Springs Railroad. The agent who was to identify the passenger and stamp his ticket there was the agent of the Hot Springs R. Co., and is so described in the ticket, as well as in the petition. If there was any duty to have an agent at Hot Springs, it was the duty of that company, and not of the defendant. The demurrer admits only the facts alleged, and does not admit the conclusion of law, inserted in the petition, that by reason of the facts previously set forth, and which do not support the conclusion, the defendant and its agent failed and refused, without just cause or excuse, to identify the plaintiff as the original purchaser of the ticket, or to sign, date and stamp it. *Hitchcock v. Buchanan*, 105 U. S. 416.

Defendant
company not
liable for
default of Hot
Springs Road.

The omission to have an agent at Hot Springs not being a breach of contract or of duty on the part of this defendant, the case is relieved of all difficulty.

The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor, in examining the tickets of other passengers, and in conducting his train with due regard to speed and safety, that he should undertake to determine, from oral statements of the passenger or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent of the Hot Springs R. Co. at Hot Springs the only and conclusive proof.

Duty of con-
ductor on de-
fendant's
train.

The necessary conclusion is that the plaintiff cannot maintain this action against the defendant for the act of its conductor in putting him off the train. *Townshend v. New York Central Railroad*, 56 N. Y. 295; *Shelton v. Lake Shore Railway*, 29 Ohio St. 214; *Frederick v. Marquette, etc., Railroad*, 37 Michigan, 342; *Bradshaw v. South Boston Railroad*, 135 Mass. 407; s. c., 16 Am. & Eng. R. R. Cas. 386; *Mardock v. Boston & Albany Railroad*, 137 Mass. 273, 299; s. c., 21 Am. & Eng. R. R. Cas. 268; *Louisville & Nashville Railroad v.*

344 TAYLOR *et ux.* v. SEABOARD AND ROANOKE R. CO.

Fleming, 14 Lea (Tenn.), 128; s. c., 18 Am. & Eng. R. R. Cas. 347.

Judgment affirmed.

Conditions in Ticket Requiring it to be Stamped and Signed by the Purchaser.—See Kent v. Baltimore & O. R. Co., 31 Am. & Eng. R. R. Cas. 125; Mosher v. St. Louis, etc., R. Co., 21 Ib. 283; Gregory v. Boston, etc., R. Co., 1 Ib. 271; Taylor v. Seaboard & R. R. Co., and note, *infra*.

TAYLOR *et ux.*

v.

SEABOARD AND ROANOKE R. CO.

(North Carolina Supreme Court, March 19, 1888.)

Passengers—Limited Tickets—Conditions—Stamping—Waiver.—Two passengers purchased tickets for Old Point, Va., and return, which were limited and required that they should be stamped by the company's agent at the point of destination. Instead of going to Old Point the passengers broke their journey at Norfolk, Va., and had their tickets stamped there. In an action against the company for damages for expulsion during their return journey, *held*, that evidence was admissible for the purpose of showing that the person who stamped the tickets at Norfolk was an agent of the company authorized to waive the condition that the ticket should be stamped at Old Point.

APPEAL from Superior Court of New Hanover County.

Actions by John Taylor and Dora Taylor, his wife, against the Seaboard & Roanoke R. Co. for damages for wrongful expulsion from a train. Plaintiffs appeal from a judgment for the defendant. The opinion states the case.

D. L. Russell for plaintiffs.

T. W. Strange for defendant.

MERRIMON, J.—This case embraces two actions, consolidated by order of the court. The plaintiffs respectively brought theirs to recover damages from the defendant, occasioned by their wrongful expulsion from one of the passenger cars of the defendant, by its agents, while regularly carrying passengers over its road from Portsmouth, in the
Facts. State of Virginia, to Weldon, in this State. The following is a copy of so much of the case stated on appeal as

is necessary to a proper understanding of the opinion of the court. On the trial the plaintiff John Taylor was then introduced as a witness in behalf of plaintiffs, who testified that he and his wife purchased at Wilmington, N. C., at a price less than the regular fare from Wilmington, N. C., to Old Point, Va., and return, two certain tickets, which were shown to witness, identified, and put in evidence, one of said tickets being signed by himself, and the other by his wife. Plaintiff further testified that in buying said tickets he and his wife did not expect or intend to stop at Old Point, Va., but to go directly by there to New York, intending to purchase at Old Point or Norfolk, Va., other tickets to New York. That plaintiffs stopped a day in Norfolk, and did not go to Old Point at all, being informed by a fellow-passenger that they could have their tickets stamped at Norfolk instead of Old Point; by his advice they applied to a person appearing to be a ticket agent or purser on board one of the steam-boats of the Bay Line, which was then lying in Norfolk, to have said tickets stamped; that said person examined the tickets, and signed and stamped them, and caused plaintiffs to sign their names on the back of their respective tickets, as appears by the ticket hereto attached; that plaintiffs left Norfolk by another route, known as the Cape Charles route, for New York, and came back from New York by the same route, and did not go to Old Point, Va., at all. Plaintiff further testified that upon his return the conductor on board the train of the defendant, after leaving Portsmouth, refused to receive the tickets of himself and wife because they were not properly stamped, and demanded the regular fare from Portsmouth to Weldon, which was paid by plaintiff. Plaintiffs then offered to prove that the person who signed and stamped the tickets at Norfolk was the authorized agent of the defendant. Defendant objected, and the court sustained the objection. The plaintiffs put in evidence the "tickets" mentioned, held by each, which were precisely similar, except as to the name of the holder. The following is a copy of one of their tickets. and the indorsements thereon:

1885	1886	1887	1888	1889	1890	1891	1892	1893	1894	1895	1896	1897	1898
Wilmington & Weldon Rail Road Co.													
Good for One Continuous First Class Passage to													
OLD POINT, VA., AND RETURN,													
As per Coupons attached. When officially Stamped.													
SUBJECT TO THE FOLLOWING CONDITIONS:													
<p>Having purchased this ticket at a reduced rate, I do, in consideration thereof, agree to be bound by and comply with the following conditions in respect thereto. The trip from point of sale hereof to point of destination shall be made within..... days from the date of issue stamped hereon. The return trip from point of departure to point of destination shall be made within.....days from date of departure, such date to be stamped on the return checks, which shall be presented to the Agent at OLD POINT, VA., for that purpose, and until such date is stamped thereon such checks cannot be used. This ticket and the checks attached are not assignable, and will be good only in the hands and for the transportation of the original purchaser. The original purchaser hereof must be identified as such by a signature to be made hereon, in the presence of and witnessed by said agent, who shall determine whether such signature is genuine by comparing the same with the signature of such purchaser hereto attached. This ticket and all checks attached shall be used in conformity with the above conditions prior to date punched in margin, and in any event shall be void on and after that date. This ticket and checks attached shall be void unless the foregoing conditions are complied with. This ticket is void unless officially stamped and dated. This Company assumes no risk on baggage except for wearing apparel, and limits its responsibility to One Hundred Dollars in value; all baggage exceeding that value will be at the risk of the owner unless taken by special contract.</p> <p>Signature, D. TAYLOR. Witness, R. E. BRANCH.</p> <p>T. M. EMERSON, Gen'l Passenger Agent.</p>													
Jan. Feb. Mar. Apr. May Jun. Jul. Aug. Sep. Oct. Nov. Dec. 31 30 29 28 27 26 25													
Day—24 23 22 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21													
546	Wilmington & Weldon Rail Road Co.												'6 'XV
	One First Class Passage												
	WELDON												
TO													
Station Stamped on Back.													
This Check is not good if detached.													
OLD POINT, VA., AND RETURN.													
W. & W., S. & R., B; S. P. Co.													

EXHIBIT A.

[NOTE.—The year 1886, on the margin of the Ticket was punched, as also the month of Oct., and the day 30th.]

[INDORSEMENTS.]

Agent of the Wilmington & Weldon R. R. Co. | Agent of Baltimore Steam Packet Co.
will stamp in space below. will stamp in space below.

In compliance with my contract with the Wilmington & Weldon Rail Road Co., and lines over which this ticket reads, I hereby subscribe my name as the original purchaser of this ticket.

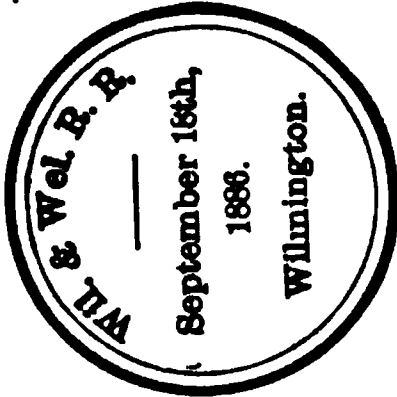
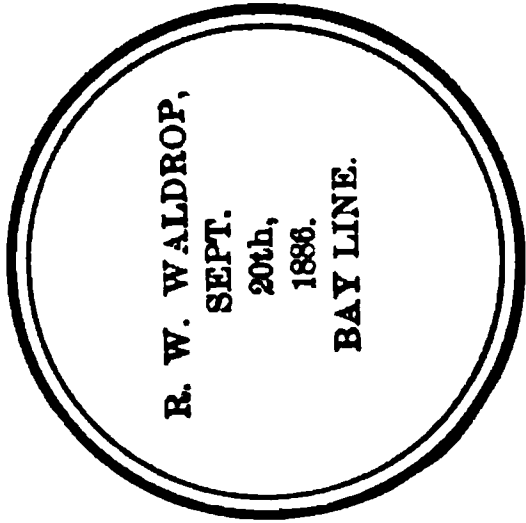
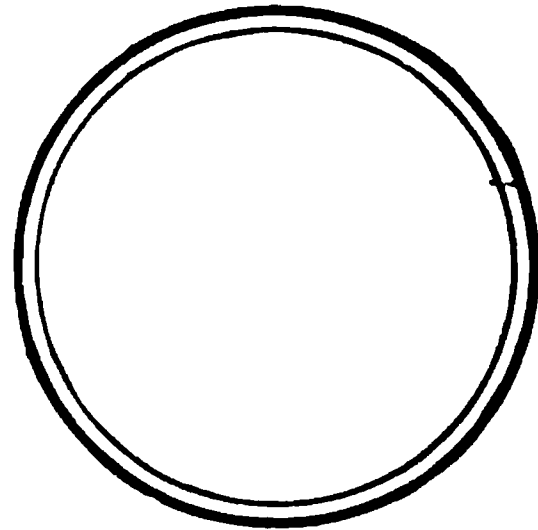
D. TAYLOR.

Witness,

R. H. CHAMBERLAIN,

Ticket Agent.

Dated.....188.....



The court being of opinion that the plaintiffs could not recover, they suffered a judgment of nonsuit, and appealed to this court.

The counsel for the appellee contended on the argument before us, and it may be here conceded to be so, that the "tickets" put in evidence on the trial each embodied a contract in writing between the holder thereof and the defendant. The latter and the holder of the ticket each had the right to insist upon a strict observance of every material stipulation, provision, and requirement contained in it. Particularly, for the present purpose, the defendant had the right to require that the plaintiffs should each be present in person and respectively present to its proper agent, at Old Point, in Virginia, his or her ticket, and identify himself or herself as the original holder thereof by writing his or her name thereon, and having the return "check" stamped as in the check provided, which the plaintiff did not do. But the contract being a simple contract in writing, it was competent for the defendant, at any time after it was made, and before any particular provision of it had been complied with, to waive a compliance with the same on the part of the plaintiffs by a subsequent verbal agreement, one not in writing. It is true that a simple contract, completely reduced to writing, cannot be contradicted, changed, or modified by parol evidence of what was said and done by the parties to it at the time it was made; because the parties agreed to put the contract in writing, and to make the writing part and evidence thereof. The very purpose of the writing is to render the agreement more certain, and to exclude parol evidence of it. Nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, either altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make it a new one, which must, in such case, be proved, partly by the written, and partly by the subsequent unwritten, parol contract, which has thus been incorporated into and made part of the original one. The reason for this seems to be that simple contracts, whether written or otherwise, are of the same dignity in contemplation of law, and therefore the written may be changed, modified, or waived, in whole or in part, by a subsequent unwritten one, express or implied. Smith, Cont. (X.) 105, and notes; 7 Wait, Act. & Def. 344, 362. The plaintiffs did not contend on the trial that the "tickets" referred to did not correctly express the contract between them respectively and the defendant, as of the time they were issued, but that subsequently the defendant,

Tickets embodied a contract.

Waiver of conditions in contract.

through its properly authorized agent, agreed to waive and did waive so much of each contract—"ticket"—in writing as required the plaintiffs to appear personally before the defendant's agent at Old Point, in Virginia, and there produce the tickets, and identify themselves respectively, as the original holders of them, by writing each his and her name on their tickets respectively, and having the return checks attached to them stamped as required. It was competent for the defendant to waive such requirement in writing or by parol agreement, and it was likewise competent for the plaintiffs to prove such agreement of waiver by parol. The evidence produced and received on the trial tended to prove such agreement that the defendant's agent, or a person representing himself to be its properly authorized agent, at Norfolk, and not at Old Point, identified the plaintiffs in the proper connection, and did there what the defendant might have required to be done at Old Point, to give the "tickets" effect for the return trip. The plaintiff's further "offered to prove that the person who signed and stamped the tickets at Norfolk was the authorized agent of the defendant;" that is, fairly interpreting the record, authorized to do what he purported and undertook to do. Upon objection, the court refused to allow the plaintiffs to produce such evidence. We think it was fairly pertinent, and competent, and should have been received. As it was not, the plaintiffs are entitled to a new trial, and we so adjudge. To that end let this opinion be certified to the superior court according to law. It is so ordered.

Evidence to
prove author-
ity of agent
to waive.

Limited Tickets.—If a passenger purchase a ticket at a reduced rate, good to return within a limited time only, his rights are limited by the ticket, and he may be ejected if he attempt to return after the expiration of the time limited. *Little Rock & T. S. R. Co. v. Dean*, 43 Ark. 529; s. c., 21 Am. & Eng. R. R. Cas., 279; *Pennington v. Philadelphia, W. & B. R. Co.*, 62 Md. 95; s. c., 18 Am. & Eng. R. R. Cas., 310. He must observe the reasonable regulations of the company as to the running of trains. But the company is bound to afford him the opportunity to use the ticket by running trains within the time; and if it failed to do so, it cannot refuse the ticket when offered on the first train after the expiration of the time, though the last day be Sunday, and the company does not run a train on that day to connect with the train of another line over which the ticket was available, and upon which the passenger travelled. *Little Rock & F. S. R. Co. v. Dean*, 43 Ark. 529; s. c., 21 Am. & Eng. R. R. Cas., 279. But it has been held that if, by delay on the part of the connecting line, the purchaser of a limited ticket reaches the station of the company which issued it after the ticket has expired, he has no right to travel on the ticket on a later train belonging to the latter company. *Pennsylvania R. Co. v. Hine*, 41 Ohio St. 276; s. c., 22 Am. & Eng. R. R. Cas., 404.

Expiration of Time Limited.—An excursion ticket contained a condition that it should not be good on return trains, but upon being properly stamped it would be exchanged for a ticket for the return journey, "good

for the day and on the train designated on the face of such exchange ticket." The ticket was duly stamped, and exchanged, but the passenger failed to use the exchange ticket on the day, and train designated upon it, and it was held that she had no right to travel on the ticket two days after the day for which it was issued. *Howard v. Chicago, St. L. & N. O. R. Co.*, 61 Miss. 194; s. c., 18 Am. & Eng. R. R. Cas. 313. A return ticket from New Orleans to Toronto good for thirty days was issued. The ticket contained a condition that on leaving Toronto the purchaser should call at the company's office there, and for the purpose of identification sign the ticket in the presence of the agent, and return to New Orleans within fifteen days from the date of signing. On July 14, the purchaser signed the condition at Toronto. The limit of the ticket, the end of the thirty days, was August 8th. On August 3d, the purchaser while on his return journey was ejected from the train, the conductor alleging that the fifteen days having expired, it was not available. The purchaser alleged that until the conductor refused to take the ticket, he did not know of the condition. It was held that the passenger was bound by the condition, and, the fifteen days having expired, could not travel on the ticket. *Rawitzky v. Louisville & N. R. Co. (La.)*, 31 Am. Eng. R. R. Cas., 129.

Condition Requiring Signature—Waiver.—If a ticket issued at a reduced rate, contain a condition that the passenger must sign the conditions upon it, among which is a stipulation that the purchaser assumes all risk to himself and baggage, the company waives the stipulation requiring the purchaser's signature if it does not require him to sign the ticket at the time of purchase, and honors the ticket for several trips before requiring his signature. *Kent v. Baltimore & O. R. Co. (Ohio)*, 31 Am. & Eng. R. R. Cas. 125.

ULRICH

v.

NEW YORK CENTRAL AND HUDSON RIVER R. CO.

(108 *New York* 80.)

Passengers—Negligence—Exemption from Liability—Free Pass.—A stipulation in a free pass exempting the railroad company issuing it from all liability for personal injuries to the person using it, is not abrogated by the purchase of a ticket entitling the holder of the pass to occupy a drawing-room car during the journey.

APPEAL from the General Term of the Court of Common Pleas for the city and county of New York.

Action by Charles F. Ulrich against the New York Central & Hudson River R. Co., to recover damages for injuries to person and property. There was a judgment for the plaintiff, which was affirmed by the general term of the court

of common pleas, and the defendant thereupon brought the present appeal. The facts are stated in the opinion.

Frank Loomis for appellant.

W. W. Rowley for respondent.

RUGER, C. J.—This action is brought by the plaintiff to recover damages of the defendant for injuries to his person and property occasioned by a collision on the defendant's railroad near Spuyten Duyvil, in January, 1882, while he was riding from Albany to New York on a regular train of the defendant's railroad. Facts.

The distance from Albany to New York is about 150 miles, and the regular fare is \$3.10. It will be assumed in the consideration of the case that the collision occurred through the negligence of the defendant's servants, and that, in the absence of the special agreement hereinafter referred to, the defendant would have been liable for the injuries suffered by the plaintiff. The plaintiff, however, was at the time riding upon a free pass issued to him by the company in 1881, and which had been duly extended to cover a period during which the injuries were sustained. This pass bore the following printed indorsement: "In consideration of receiving this ticket, the person who uses it voluntarily assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether by negligence of their agents or otherwise, for any injury to his person, or for any loss or injury to his property, and that, as for him, in the use of this ticket, he will not consider the company as common carriers, or liable to him as such." It is conceded that the plaintiff used this pass on the trip during the course of which the accident occurred, and exhibited it to the conductor when his passage ticket was demanded of him.

Unless the contract indicated by this pass and its indorsements has been rescinded or annulled by some other valid contract between the parties, it is clear that their rights and liabilities must be governed by its provisions. It is not claimed by the respondent but that if this contract was in full force, and the plaintiff was actually riding at the time of the accident solely by virtue of it, it would control the liability of the defendant, and exempt it wholly therefrom. *Seybolt v. Railroad Co.*, 95 N. Y. 562; s. c., 18 Am. & Eng. R. R. Cas. 162. It is claimed, however, that, by reason of the purchase of a ticket entitling him to the use and occupation of a particular seat during the passage in the drawing-room car "Empire," he became a passenger for hire, and that the contract expressed in the pass must be deemed to have been abrogated and annulled to a

Contract on
pass governs
unless re-
scinded.

certain extent by the new contract. By reference to the opinion delivered in the court below upon a former appeal of this case, and which is contained in the appeal-book, we infer that the judgment in favor of the plaintiff rendered by the trial court was affirmed upon the theory that the contract for a seat in the drawing-room car was made with the agents of the defendant, and that such a contract subverted or modified for this trip that formed by the pass and its indorsements.

It is not pretended but that the plaintiff secured his transportation on this occasion by virtue of his pass, but it is suggested by the opinion referred to that the contract

Effect of purchasing seat in drawing room car.

for the purchase of a seat annulled the express condition upon which the pass was issued to the plaintiff, while it left the pass in full vigor so far as it gave the plaintiff a right to be carried on defendant's road from Albany to New York. Perhaps the language used by the court below will afford a more accurate view of its position, viz.: "The defendant has taken money from the plaintiff for carrying him, and it has no right to say that he was a free passenger, and to ask the court to incorporate into the drawing-room ticket the provisions of the free pass." The vice of this argument is in the assumption that "the defendant has taken money from the plaintiff for carrying him." Assuming, for the purposes of the argument, that the purchase, by a passenger on a train, of a drawing-room ticket, from a drawing-room car conductor, has the same force and effect as though purchased from the train conductor, of which there is much doubt, we yet think that such a purchase has no effect upon the *status* of the purchaser as a passenger. The contracts of a railroad corporation must be construed by the same rules which apply to those of all other parties, and must be given the force and effect which were within the contemplation and understanding of the parties when they were made. The inquiry then is, What was the intention of the parties in the transaction culminating in the sale of a seat in the drawing-room car for the trip?

It is undoubtedly true that if the plaintiff had paid his fare, or had made a valid contract with the defendant for passage which was inconsistent with the provisions of the pass, it might be inferred that the parties intended by such an arrangement to rescind the contract previously existing between them, at least to the extent of any inconsistency. But we are of the opinion that the transaction in question had no such effect, and that the purchase of a right to enjoy particular and exclusive accommodations during the trip, whether made with the defendant or otherwise, did not, so long as the pass was used to secure transportation, in any way affect

the validity of the agreement expressed therein. Indeed, the terms printed upon the ticket by which the plaintiff secured his seat in the drawing-room car repel a contrary inference, and plainly indicate that the plaintiff was required to rely for transportation upon his pass; for it is there stated that "this check, with passage ticket or fare, will be taken up by the conductor in charge of train." The inference is irresistible that the ticket for a seat had no relation to his right to transportation, but that the latter was expected to be made the subject of a distinct and separate contract to be formed by an agreement between the plaintiff and the defendant. Instead of its being supposed by the parties that the purchase of a seat modified the previous contract, it was expressly understood that the passenger was to secure the right of transportation by some arrangement already or thereafter to be made with the conductor of the train. This he did by the production and presentation of the pass to the conductor, and its recognition by him; and, by the express provisions of the contract embodied therein, he forfeited his right to claim damages for any injuries suffered either to his person or property occurring during that trip. The contract for a seat did not make the purchaser a passenger in any sense, but it simply provided that if the purchaser secured a right to ride on that train he could also enjoy the advantages of a specified seat during the trip, if he so desired. The securing of a right to ride on the train was the condition upon which he became entitled to occupy the specified seat during the trip, and non-compliance with this condition would clearly preclude the purchaser from deriving any advantage from his purchase of the drawing-room ticket. We can discover no principle upon which it can be held that the contract expressed by the pass should be considered rescinded or inoperative. Certainly no express agreement was made to that effect, and we think none can be implied from the transaction referred to.

It cannot be claimed that the purchase by a passenger of special and exclusive accommodations on a railroad train, not open to the enjoyment of passengers generally by virtue of their passage tickets, gives the purchaser a right to transportation, and yet the argument of the respondent implies that he had the right to use the pass to secure his transportation, and still repudiate the conditions upon which alone he was authorized to use it. The pass gave the plaintiff the right to enter any of the cars attached to the train, and occupy a seat therein during the passage from Albany to New York, except certain cars set apart for special service and use. The pass gave the passenger no right to occupy a seat in such

cars, and the money paid by the plaintiff to secure this seat had no relation to his right of transportation. The passenger could not have supposed that it did, for he not only used his pass for that purpose, but from the insignificance of the price paid for his seat, as compared with the regular fare for such a trip, the idea is repelled that he supposed he was thereby securing transportation also. It could not be contended for a moment that the holder of a drawing-room car ticket could, by force of such ticket alone, insist upon being carried over a railroad to his place of destination, or that the railroad company would be liable for damages for ejecting such holder from its cars for non-payment of fare, if he should refuse to pay the customary sum charged for transportation. No such rights are contemplated by the parties to such a transaction. The contract indicated by his purchase of a drawing-room seat certainly did not by express terms refer to or provide for any modification or rescission of the previous contract, and there is not a circumstance attending the transaction from which an intention that it should, can be inferred. The court below seemed to suppose that the case of *Thorpe v. Railroad Co.*, 76 N. Y. 409, tended to support the recovery in this case, but we are of the opinion that it has no bearing upon the question involved herein. That case holds that the servants in a drawing-room car, in their relations to passengers, and their conduct in preserving order and enforcing the rules and orders of the company, are the servants of the railroad corporation; but that case is very far from holding that such servants have the right to make contracts on behalf of the company for transportation, or that, if they do, they necessarily rescind other contracts existing between the passenger and the company.

We are, for the reasons stated, of the opinion that the judgments of the courts below should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Injuries to Passengers Riding on Free Passes.—See *Buffalo, etc., R. Co. v. O'Hare*, 9 Am. & Eng. R. R. Cas. 317; *Kimball v. Boston & A. R. Co.*, 13 Ib. 55; *Abell v. Western Maryland R. Co.*, 21 Ib. 503; *Carroll v. Missouri Pac. R. Co.*, 26 Ib. 268; *Gulf, etc., R. Co. v. McGowan*, 26 Ib. 274; *Camden & A. R. Co. v. Bausch*, 28 Ib. 142.

BATES

v.

OLD COLONY R. Co.

(Massachusetts Supreme Judicial Court, June 20, 1888.)

Passengers—Express Messengers—Waiver of Claim—Validity.—A stipulation in a special contract with an express messenger that in return for permission to ride in the baggage car, he should assume all risk of accident and injuries resulting therefrom, is supported by sufficient consideration.

Same—Reasonable Condition—Public Policy.—A railroad company being under no obligation to allow express messenger to ride in the baggage cars of its trains, it is entitled to protect itself against an increase of its liabilities upon giving permission to do so, and such a condition relieving it from liability for accidents and personal injuries is neither unreasonable nor against public policy.

Same—Statutory Provision—Construction.—Under the provisions of the Massachusetts statute which requires railroad companies to give all persons and companies reasonable and equal terms and facilities for the transportation of persons and merchandise, railroad corporations are not required to discriminate in favor of express companies, and to carry their merchandise and messengers in the baggage cars of passenger trains on reasonable terms equally favorable to express companies.

ON exceptions from Superior Court, Suffolk County.

Action of tort by Benjamin F. Bates against the Old Colony R. Co. for damages for personal injuries. Plaintiff, who was a messenger in the employment of the New York & Boston Despatch Company, received the injuries complained of in an accident on defendant's road. The company's rules prohibited passengers from travelling on the baggage cars without releasing the company from claims for injuries sustained while so travelling, and plaintiff had signed a contract which provided that "in consideration of said company permitting him to ride upon baggage cars on its trains, he would assume all risks of accidents resulting therefrom, and would hold the company free and discharged from all claims and demands in anyway growing out of the injuries received by him while so riding." The express messengers travelling upon the company's trains all received quarterly season tickets which were similar in terms, and issued at the same rates as those

issued to the regular season passengers, except that the following memorandum was stamped upon them: "The holder of this ticket, having released the company from all liability will be permitted to ride in the baggage car." The court instructed the jury that the regulation and agreement did not bar plaintiff's right of recovery and a verdict was returned for \$10,000. The defendant excepted.

J. H. Benton, Jr., for defendant.

Samuel C. Darling for plaintiff.

W. ALLEN, J.—The rules of defendant prohibited passengers from riding in baggage cars, and the plaintiff had no right as a passenger to ride where he was riding at the time he was injured. He was there under a special contract, by

Facts. which, in consideration that the defendant would allow him to ride in the baggage car he assumed all risk of accident and injuries resulting therefrom, and agreed to hold the defendant free and discharged from all claims and demands growing out of any injuries received by him while so riding. The parties plainly intended to include injuries resulting from the negligence of the defendant's servants. We need not consider whether the contract would be construed or held to include injuries to which riding in the baggage car did not contribute. There was evidence tending to show that the plaintiff would not have been injured had he been in a passenger car, and that his presence in the baggage car directly contributed to the injury. The ruling of the court ordering a verdict for the plaintiff was a ruling that the plaintiff was entitled to recover for injury caused by the negligence of the defendant's servants, although his riding in the baggage car contributed to the injury. In considering the correctness of this ruling, the contract of the plaintiff must be taken to have been that he would assume

Plaintiff's contract valid
—Riding in the baggage car. the risk of injury from the negligence of the defendant's servants, to which his riding in the baggage car, under the permission given by the defendant, should contribute. The objection is

that the contract is void, as without consideration, unreasonable, and against public policy. We see no objection to the contract as construed and applied in this case. It was the duty of the defendant, as a carrier of passengers, to transport persons over its road, on their paying the established fare, and to see that its servants used due care to secure the safety of its passengers. It was its duty to give, to persons paying the established rates, tickets which would be evidence of their right to carriage, and of the defendant's obligation to carry them with due care. The defendant was

ready to do this, and did sell to the plaintiff a season ticket which gave to him all the rights of a passenger. The contract in question was made to give him a right which did not belong to him as a passenger. The plaintiff, having the rights of a passenger, desired to ride in the baggage car. The regulations of the defendant, as well as personal prudence, forbade him to ride there, and, if he had attempted to do so, he not only would have assumed all risks of injuries resulting therefrom, but would have been liable to be expelled from the car by the defendant. It is difficult to see upon what ground it can be contended that an agreement of the plaintiff that, in consideration that the defendant would permit him to ride in the baggage car, he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defendant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant, on the ground that he was there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car.

The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers, by contracts with their customers or passengers in regard to such duties, does not arise under this contract, as construed in this case. See *Railroad v. Lockwood*, 17 Wall. 358; *Griswold v. Railroad Co.*, 53 Conn. 371; s. c., 26 Am. & Eng. R. R. Cas. 280. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his rights as a passenger, and he was under no compulsion to enter into it.

Right of carrier to limit liability for negligence.

It is contended that the plaintiff, as the servant of the express company, had a right, by statute, to ride in the baggage car, and that, therefore, the case comes within the decisions

that it is unreasonable, and against public policy, for a person, as a condition of his becoming a passenger on a railroad, to agree that he will take the risk of the negligence of the servants of the railroad in transporting him. The express company is a common carrier, and it is not contended that a railroad corporation is bound to transport, in the baggage cars of its passenger trains, the merchandise and servants of another common carrier, unless required to do so by some statute. See *Sargent v. Railroad Corp.*, 115 Mass. 416; *Express Cases*, 117 U. S. 1; s. c., 23 Am. & Eng. R. R. Cas. 545. The statute relied on is Pub. St. c. 112, § 188, in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents, and servants, and of any merchandise and other property upon its railroad, and for the use of its depot or other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." The statute cannot be construed to require railroad corporations to discriminate in favor of express companies, and to carry their merchandise and messengers in the baggage cars of passenger trains on reasonable terms, equally favorable to all express companies. If that were the meaning of the statute, no questions as to the equality of the terms given to the plaintiff or the company he represented would arise. The same contract was required of all other express messengers who rode in baggage cars. The only question that would arise is whether the terms granted were reasonable. The fact that the plaintiff was riding in the baggage car as an express messenger, in charge of merchandise, which was being transported there, shows more clearly that the contract by the express company and the plaintiff was not unreasonable as against public policy. He was there as a servant, engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the one relating to merchandise carried for passengers, and the other to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risks of the negligence of the servants of the railroad. It does not seem

Right of plaintiff to ride in baggage car as servant of Express Co.—Statute.

that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger, in performing his duties, should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or against public policy. When we add the considerations that the plaintiff was a passenger whose rights as such were not impaired by the agreement, and that the agreement was to assume the risks of injuries resulting from his riding in baggage cars, in consideration of being permitted to ride there to conduct the express business, it seems clear that the contract is a valid and sufficient defence to an action against the defendant for injuries resulting from the negligence of the defendant's servants, to which the fact that the plaintiff was riding in the baggage car under the agreement contributed. Exceptions sustained.

Express Messenger—Injury to—Defective Machinery and Negligence in Employing Servants.—In *Lyon v. Union Pac. R. Co.*, 35 Fed. Rep., 111. a complaint alleged in substance that plaintiff was an express messenger on defendant's train of cars; that the air-brake apparatus of the several coaches were different and not adjustable, and that by reason thereof, when the train was stopped at B. and the engine detached, the brakes were not set, and the train, by force of gravity, moved down a steep grade and was thrown from the track, and plaintiff was injured; and also alleged that the accident occurred through defendant's employees negligently leaving the train without setting the brakes. *Held*, that the complainant stated a good cause of action.

HARDENBERGH

v.

ST. PAUL, MINNEAPOLIS AND MANITOBA R. CO.

(*Minnesota Supreme Court, June 18, 1888.*)

Passengers—Seats—Duty of Company.—Plaintiff, at M., desiring to go to W., entered one of defendant's regular passenger trains about to start for the latter place. Before he learned he could get no seat, the train was going at a high rate of speed. He asked the conductor to provide him a seat, but the conductor refused. On his fare being demanded, plaintiff offered to pay it if a seat were provided him, but refused to pay it unless a seat were provided. *Held*, that plaintiff had a right so to refuse to pay the fare, and he did not thereby become a trespasser on the train; for a passenger has a right to be provided with a seat.

Same—Ejection—Station.—A railroad company, having the right to eject from its train one not a trespasser, must do so at a regular station. *Wyman v. Railroad Co.*, 34 Minn. 210, distinguished.

APPEAL from District Court, Hennepin county.

Action to recover damages for the wrongful ejection of plaintiff from one of defendant's trains.

Selden Bacon for appellant.

Benton & Roberts for respondent.

GILFILLAN, C. J.—Defendant was a common carrier of passengers for hire, maintaining and operating, for that purpose, a line of railway from Minneapolis to Wayzata, on Lake Minnetonka. The plaintiff, for the purpose of going from

Facts. Minneapolis to Wayzata, entered, at the former place, one of defendant's regular passenger trains for the latter place, which immediately started, and, before plaintiff could look through the cars in the train to find a seat, it was going at a high rate of speed. Upon looking through the train, he could find no seat vacant. At the first opportunity he applied to the conductor to furnish him a seat, and the conductor (as we assume, because the seats were all filled) refused to provide him one. The conductor then demanded his fare, which the plaintiff offered to pay if supplied with a seat, but refused to pay unless supplied with a seat. Up to this the train had made no stop. The conductor then stopped the train, and forcibly put the plaintiff off at a place distant from any dwelling-house, more than two miles distant from any flag-station, and more than five miles distant from any regular station of defendant. No complaint is made that the conductor, if he had a right to eject plaintiff, used more than the proper amount of force. The only question is, had the conductor a right, under the circumstances, to put plaintiff off at the place where he did; that is, out in the country, at a distance from any station?

In the case of a trespasser on a train,—that is, a person wrongfully upon it, as where he enters it intending not to pay the fare, or where he wrongfully refuses to pay the fare when properly demanded,—the conductor is not required to put him

Refusal to pay fare—Plaintiff not a trespasser—Place of expulsion. off at one place rather than another, provided he do not wantonly expose him to peril of serious personal injury. With that qualification, he may put him off at a place other than a station, and is not required to consider his mere convenience.

Wyman v. Railroad Co., 34 Minn. 210; s. c., 22 Am. & Eng. R. R. Cas. 402. This plaintiff, however, was not wrongfully on the train. It is, in general, the duty of a railroad company to provide sufficient cars to carry all who have occasion to travel on its line of road. As the law does not require unreasonable things, a single instance, or occasional instances, of insufficiency in the amount of means to travel,

caused by a rush of travel not reasonably to be expected by the company, would probably be excused; and the railroad company, like all other common carriers of passengers, must provide those whom it carries with the usual, reasonable accommodations for comfort in travelling, including seats. This is too well established to need citation of authorities. When this plaintiff, desiring to take passage to Wayzata, found one of defendant's regular passenger trains about to start for that place, he had a right to enter it, assuming that the defendant had done its duty in providing sufficient and suitable accommodations for all having occasion to become passengers on the train. The train started, and had reached a high rate of speed, before he learned that there were not sufficient seats. When he learned that he could get no seat, he had a right to elect either to accept such accommodations as were offered and pay the fare, or to refuse to pay the fare unless he could have the accommodations to which a passenger is entitled. If he elected the latter course, then (inasmuch as he was not entitled to the passage, even though no seat was provided him, without paying fare) it was his duty to leave the train on the first reasonable opportunity afforded him. He could not be expected to leave the train while in motion. A reasonable opportunity to leave it, would have been the stopping it in a suitable and reasonable place. As he had a right to refuse to pay fare unless a seat was provided him, he did not become wrongfully on the train by so refusing. He could become a trespasser only by refusing to leave the train, on a reasonable opportunity being afforded. Such opportunity the defendant was bound to afford unless it chose to carry him without fare. It was the defendant's, not the plaintiff's, fault that a seat was not provided. The case differs from the *Wyman* case. For in that case the refusal to pay fare was wrongful; in this, the refusal, unless a seat was provided him, was rightful. In that case the plaintiff by the refusal became a trespasser; in this, he did not. This case is somewhat analogous to *Maples v. Railroad Co.*, 38 Conn. 557, in which it was laid down that a railroad company, having a right to eject from its train one not a trespasser, must do so at some regular station on its road. That is a reasonable rule, and that the decision was in accordance with the general rule was recognized by this court in the *Wyman* case. See also *Gallena v. Railroad Co.*, 13 Fed. Rep. 116.

Order reversed.

Company must Provide Safe Place and Seats for Passengers.—*Louisville, etc., R. Co. v. Kelley*, 13 Am. & Eng. R. R. Cas. 1.

PULLMAN PALACE CAR CO.

v.

EHRMAN.

(Mississippi Supreme Court, April 6, 1888.)

Sleeping Car—Refusal to Make up Berth—Right of Passenger.—A person travelling on board a car which is both a sleeping and eating car, is not entitled to have his berth made up by the porter for his use before the porter has furnished lunches ordered by other passengers previously to the giving of the order to make up the berth.

APPEAL from Circuit Court, Warren County.

Action by Charles Ehrman against the Pullman Palace Car Co. to recover damages for the wrongful refusal of the defendant's servant to make up his sleeping berth when requested. Plaintiff purchased a ticket which entitled him to travel from New Orleans to Vicksburg, upon a combination car, that is, both a sleeping and an eating car. After leaving New Orleans he requested the porter to prepare his bed, and the porter replied that he would do so as soon as he had furnished two lunches which had been ordered by other passengers. Plaintiff then called the conductor, and asked whether the car was a sleeping or an eating car. The conductor replied that it was both; that the rules required orders to be filled in the order in which they were given; that plaintiff's bed should be made as soon as the porter had furnished the lunches; and ordered the porter to make plaintiff's bed as soon as he got through. Plaintiff demanded that his bed should be made at once, or that his money should be repaid. The conductor refused to pay the money, and said that his bed should be made as soon as the porter had furnished the orders previously received. Plaintiff testified that he was treated abusively, left the car, went forward, and sat up until he arrived at Vicksburg. The evidence showed that plaintiff's bed was made as soon as the porter had furnished the lunches, and that all the berths were made down by 9 o'clock. There was a verdict and judgment for the plaintiff from which defendant appeals.

Percy Roberts for appellant.

J. M. Gibson for appellee.

CAMPBELL, J.—The verdict is not sustained by the evidence. It is manifest that no wrong was done the appellee of which he can justly complain; and whatever unpleasantness he encountered appears to have been brought about as the direct and natural result of his own conduct. He had no right to have his bed made instantly, as demanded, under the circumstances; and as it was made ready in good time, and he chose not to use it, as he might, he can blame no one but himself for the discomfort of sitting up all night. The rudeness complained of in the altercation with the servants of the appellant sprang naturally from the manner and language of the appellee, and furnish an apt illustration of Solomon's proverb, "An angry man stirreth up strife." Reversed.

HOUSTON AND TEXAS CENTRAL R. CO.

v.

HILL.

(*Texas Supreme Court, February 17, 1888.*)

Excursion Tickets—Contract for Sale—Breach—Right of Action.—A person who has contracted with a railroad company for the issue of a large number of excursion tickets, and who has re-sold a large number of the tickets at an advance, can maintain an action and recover the full amount of damages caused by the company's breach of its contract without joining his sub-purchaser as a party plaintiff.

Same—Insufficient Tender.—In such action proof of a tender of 15 tickets at the rate agreed upon will not have the effect of reducing the plaintiff's claim as to the tickets tendered, to the difference between the contract rate and the regular fare, the railroad company having contracted to issue a number very largely in excess of the number tendered.

Same—Evidence—Testimony of Sub-Vendee.—The testimony of the sub-purchaser of the tickets that he had bought a large number of tickets from the plaintiff at an advanced price is admissible in such action.

Same—Measure of Damages.—The measure of the plaintiff's damage in such action is the net profit the plaintiff would have realized on such number of tickets as the evidence satisfies the jury, with reasonable certainty, he would have sold.

APPEAL from District Court, Galveston County.

Action by G. A. Hill against the Houston & Texas Central R. Co. for breach of a contract to carry excursionists from Galveston to Dallas at \$5.00 for the round trip.

The defendant appeals from a judgment for the plaintiff. The opinion states the case.

O. T. Holt for appellant.

James B. Stubbs and Ballinger, Mott & Terry for appellee.

GAINES, J.—This case was before this court upon a former appeal, and is reported in 63. Tex. 381; s. c., 21 Am. & Eng. R. R. Cas., 263. The nature of the controversy is shown by the opinion there reported. It appears from the testimony ad-

Facts. duced on the last trial that after appellee had made his contract with appellant's agent for the transportation of the excursionists to Dallas, he issued his own tickets, each of which entitled the purchaser thereof to receive a round-trip ticket to that city over appellant's road. Appellee (who was plaintiff below) testified that he sold one Levy 500 of his own tickets at an advance of \$1.50 each over the amount he was to pay the defendant company. Counsel for defendant asked the court to give the following special instruction: "If the jury believe from the evidence that the plaintiff, G. A. Hill, had, at the institution of this suit, and has now, only one-half interest in the result of said suit, he can only recover for his interest, and none other, unless the evidence shows that he has authority to sue and recover for others who have an interest in said suit." This was refused by the court, and the refusal is the ground for the first assign-

Plaintiff's interest in the suit—Recovery. ment of error. In our opinion the action of the court was not erroneous. If the defendant had delivered its tickets in compliance with its contract, and if Levy had complied with his, plaintiff would have made a gross profit on the 500 tickets of \$750, and to recover his profits on these tickets as damages was in part the object of his suit. Levy had no claim upon these damages; nor did he by the purchase of plaintiff's tickets acquire any direct interest or property in plaintiff's contract with the defendant company. If he suffered any damages by Hill's failure to deliver the railroad tickets according to his promise, he doubtless had a cause of action against plaintiff, but not against the company.

It was also proved that the defendant after its repudiation of the contract made by plaintiff with its ticket-agent, Gray, through its general manager, proposed to issue tickets for 15 persons at the price fixed in the original agreement. In view of this evidence, defendant, by counsel, asked that this instruction be given to the jury: "If the jury believe from the evidence that the defendant, the Houston & Texas Central R. Co. proposed and offered to transport and carry fifteen

Tender of fifteen tickets—Instructions to effect of.

persons for plaintiff, from Galveston to Dallas and return, for the sum of five dollars each, then plaintiff cannot recover for the difference between five dollars and the regular fare on fifteen persons from Galveston to Dallas and return." This was also refused, and the refusal is assigned as error. Plaintiff testified that the number of the tickets he was to receive was not limited in the contract; and all the evidence showed that it was contemplated that he would dispose of a very large number. The defendant could only relieve itself from responding to plaintiff in damages for the breach of its obligation by a compliance with the entire contract. Plaintiff did not agree to purchase only 15 tickets at the price stipulated, and he was under no obligation to receive that number in satisfaction of his agreement either in whole or in part. Besides, it seems the tender of the 15 tickets was accompanied with the condition that plaintiff should relinquish his claim to any other. The court did not err in refusing the charge.

Third assignment of error is as follows: "Because the court erred in permitting the witness Newson to state conversations had with persons in Galveston in regard to the excursion to Dallas." The testimony objected to was that at least 20 persons told the witness they intended to go to Dallas with plaintiff's excursion. It may be seriously doubted whether or not the testimony was admissible. It is well settled that the declarations of persons as to their purpose in setting out on a journey, or in changing their place of abode, when accompanying the acts done, are competent to prove their intention. *Baptiste v. De Volunbrun*, 5 Har. & J. 86; *Gorham v. Canton*, 5 Greenl. 266. But in this case, if practicable to call the persons who made the declarations (which may be doubted), it would seem their own testimony would have been the better evidence of their intention to go on the excursion. It appears, however, that plaintiff himself, without objection, testified to the effect that as many as 300 persons declared to him their intention of going on the journey. And that witness swore that "a great many" expressed a like intention to him, and this was not objected to. Still another testified to the same effect, and to his testimony no bill of exceptions was reserved. Admitting, then, that the testimony—the admission of which is assigned as error—was illegal, can we say that it in any manner affected the verdict? We think not. The effect of all this evidence was merely to show that a large, but inadequate, number of persons had intended to join the excursion, and hence to buy the plaintiff's tickets. This was amply proved, so far as such testi-

Evidence—De-
clarations of
persons as to
intentions to
purchase
tickets.

mony could prove it, by the evidence which was not objected to; so that we may say with reasonable assurance that, if the objection had been sustained, the verdict would not have been different. In such a case the admission of illegal testimony is harmless error. *Moore v. Anderson*, 30 Tex. 224; *Barrow v. Philleo*, 14 Tex. 345.

It is complained in the fourth assignment that the court erred in permitting Levy to testify that he purchased tickets from plaintiff. But it is certainly true that if plaintiff made a contract of sale with Levy, by which the latter agreed to take 500 tickets at \$1.50 more per ticket than plaintiff was to pay for them, the latter was entitled to recover this profit, less the expense he would have incurred in executing his enterprise. The evidence was clearly admissible.

Fifth assignment of error is as follows: "Because the court erred in charging the jury that plaintiff was entitled to the profits on all tickets plaintiff would have sold." To show that this assignment is not well taken, we need only quote so much of the charge as relates to the measure of damages and the proof required to establish the amount: "In case your verdict be for plaintiff for damages, then the measure of damages would be the difference between the amount the plaintiff was to pay the company for each excursionist that would have gone up from Galveston to Dallas . . . with plaintiff's proposed excursion party, and the amount that Hill proposed to take them for, after deducting, however, from such profits, the expense that Hill incurred, and the further expenses that Hill would have incurred in getting up the excursion; that is to say, the net profits that Hill would have made, and which he lost by reason of defendant's breach of contract. And in order to determine, with reasonable certainty, the number of excursionists that Hill would have obtained for the proposed excursion, . . . you must look to the evidence; and as, in cases of this character, there can be nothing like absolute certainty, in ascertaining the number of excursionists that would have gone up on said day from Galveston and Houston under Hill's auspices you must not be guided by mere suppositions and possibilities, but must look to and determine from the evidence, with reasonable certainty, the number that would have gone up from said places as excursionists of Hill." Such is the portion of the charge complained of. It will be seen that it restricts plaintiff's recovery to the amount of net profit that he would have realized on the number of tickets the evidence satisfies the jury, with reasonable certainty, he would have sold. This charge is restrictive

enough. Profits that were proved with reasonable certainty were not too "indefinite and uncertain" to be recovered as damages. It seems to us that the jury did not follow the rule laid down by the court, and have awarded speculative damages. The verdict seems to us excessive. But there is no assignment of error upon this ground, and we cannot reverse the judgment upon this account. The assignments of error presented in the brief are not well taken, and therefore the judgment will be affirmed.

See *Houston & Texas Cent. R. Co. v. Hill*, 21 Am. & Eng. R. R. Cas., 263.

EAST LINE AND RED RIVER R. Co.

v.

RUSHING.

(*Texas Supreme Court, December 9, 1887.*)

Sale of Road—Private Act—Pleading—Personal Injuries.—To constitute a sufficient defence to an action for personal injuries, a railway company must not only, under a statute authorizing the reference to private acts by title, substance and date of approval, in pleadings, plead that by virtue of a private act referred to in the authorized manner it had sold its road, but must also show that it had complied with any conditions imposed by the statute upon the sale, *e. g.*, that the purchasing company should be a connecting, but not a parallel or competing line.

Passenger—Personal Injuries—Degree of Care.—In the operation of its trains, a railway company is not bound to exercise only a degree of care sufficient to avoid injury to a person of ordinary physical ability, but must exercise such care as will avoid injuring persons in feeble health who may be upon its trains; and it will be responsible for an injury to a person who had just recovered from bodily injuries which he had received, and who is thrown across the seats of the cars, and again injured, through the running of a switch engine against the car while the passengers were attempting to alight.

Same—Alighting—Reasonable Time.—In an action to recover damages for injuries caused by running a switch engine, used for the purpose of coupling against a passenger car in which the plaintiff was, the plaintiff is entitled to recover if a reasonable time had not been allowed for him to alight before making the coupling.

Same—Negligence of Conductor and Brakeman.—In such action, evidence that the conductor had left the train before all the passengers had alighted, and that the brakeman making the coupling gave no warning, is sufficient to justify the submission of the question of gross negligence to the jury.

Same—Former Injuries—Instruction.—The plaintiff received injuries in the hip and knee. The court charged the jury that if the plaintiff had been previously injured, and at the time his knee was so far recovered that with ordinary care it would have gotten well, or that it was well, and that without plaintiff's fault it was hurt by the negligence of the defendant, so as to render it stiff, the defendant would be liable. *Held*, that this instruction, if taken in connection with an instruction already given, that if plaintiff's injuries were received prior to his becoming a passenger, they must find for defendant, was not erroneous as assuming as a fact that the plaintiff had previously been injured only at the knee.

APPEAL from District Court, Hopkins County.

Action by J. S. Rushing against the East Line & Red River R. Co. to recover damages for personal injuries. The jury found for plaintiff, and the defendant appeals from a judgment entered.

Whitaker & Bonner for appellant.

E. W. Terhune and R. L. Porter for appellee.

WILLIE, C.J.—This was a suit by Rushing against the appellant, in which damages were claimed for injuries received by the plaintiff while a passenger on the defendant's train. The defendant pleaded a general denial of the allegations of the petition; that the plaintiff's negligence contributed towards producing the injuries; and, further, that it had sold and transferred its railroad and equipments to the Missouri, Kansas & Texas R. Co., by due authority of law, in 1881; and that at the time plaintiff was injured it was not operating the road, nor was it in any way responsible for its control and management. To this last plea a demurrer was sustained by the court below, and that part of the answer was stricken out. The trial of the cause before a jury resulted in a verdict for the plaintiff for \$5,000, and from the judgment rendered thereon this appeal is taken.

The first error assigned is to the ruling of the court sustaining the plaintiff's exception to the defendant's special answer setting up the sale and transfer of its road to the Missouri, Kansas & Texas R. Co. The answer alleges that the sale was made by virtue of certain acts of the legislature, which are not set out in full, but are pleaded by their

title and date of approval; and the further averment is made that these acts authorized the sale and transfer to be made. Our statute provides that, when any pleading is founded wholly or in part upon any private act, it shall not be necessary to set it out, but it shall be sufficient to recite the title thereof, and the date of its approval, and allege in substance so much of

Sale of road—
Private act—
Pleading.

said act as may be pertinent to the cause of action or defence. Rev. St. art. 1191. Admitting that an allegation that an act authorized a railroad company to sell and transfer its road is an averment of the substance of that part of the law which gives the authority, we think that such an allegation places before the court the entire act so far as it relates to the authority claimed, and the court may examine it to see whether its provisions in this respect are properly stated. The object of the statute is to relieve the pleader of the necessity of setting forth the act in any of its provisions in full, and to give him, his adversary, and the court the same benefit of these provisions as if they formed a part of his pleading. Hence, upon a demurrer to the answer, the court may look at the act, and see if the substance of the provision relied on is properly alleged. The defendant asserted that certain acts of the legislature authorized it to sell its road and equipments to the Missouri, Kansas & Texas R. Co. The particular sections of the acts in which the authority was to be found were not pointed out, but the entire acts were submitted to the inspection of the court, and it was alleged that they contained the grant of power relied on. Statutes of which judicial notice could not otherwise have been taken were thus brought to the actual knowledge of the court, and they could be taken into consideration in passing upon the question as to whether the answer had properly construed them.

The fifth section of the act of 1871 pleaded by the appellant provides in its last clause as follows: "Said company is authorized, and the right is hereby granted them, to cross or connect with any other railway, to join stocks or consolidate with any other railway company running in the same general direction." The fourth section of the amendatory act of 1873 contains this provision: "That said company shall not have the right to rent, sell, lease, or consolidate with any parallel or competing railroad in the State." The fourth section of the act of August 2, 1870, in relation to the Missouri, Kansas & Texas R. Co., reads as follows: "That the said company shall have the right to purchase, sell, lease, join stocks, unite, or consolidate with any connecting railroad company, by and with the approval and consent of a majority in interest of the stockholders in each company, and to acquire and merge into itself all or any part of the property, rights, and privileges, and franchises of such other company, upon such terms and conditions as may be agreed upon by their respective boards of directors." All of these acts were pleaded by the company; and if it was empowered to sell, and the Missouri, Kansas & Texas R. Co.

to buy, its road, and operate the same, so as to release the appellant from responsibility for the wrongs complained of in this action, the power must be found in the sections we have recited. The power granted the Missouri, Kansas & Texas Company to purchase is restricted in one respect only,—the property, franchises, etc., purchased must belong to some company whose line connects with its own. But in the case of the East Line & Red River Company further restrictions are imposed as to sale and consolidation. This company must not consolidate with or sell to any other company except such as has a line of road running in the same general direction, nor to a parallel or competing railroad. In order to render a contract of sale effective, there must be both a power to sell in the vendor, and a power to purchase in the vendee. If, therefore, the lines of these two roads did not connect, the sale was unauthorized, because the purchasing company had no right to buy; and if they were parallel or competing lines, it was unauthorized, because the appellant company had no right to sell. It may be that this court, judicially knowing the geography of the State, might take notice from the general direction of these two roads, as fixed by the statutes under consideration, that their lines must necessarily cross each other, and could therefore treat them as connecting lines, and not parallel to each other. But as to whether they were competing lines we could have no judicial knowledge whatever. Competition between railroads may exist, and yet their lines not run parallel, but cross each other at some point in their route. Hence, when a question as to such competition is raised, the court or jury must have proof upon the subject, as in case of any other fact submitted for its consideration.

The appellant claimed a right to which it was not entitled by the general law of the State. It claimed a privilege not accorded to railroad companies generally, either by common law or statute. It claimed this under a private act passed for its special benefit. It was its duty, therefore, to bring itself clearly within the purview of the act; to show that the circumstances, under which the right to sell its franchise and property could be claimed, actually existed at the time of the sale; that the road to which it was sold was a connecting, but not a parallel or competing, line. There was no allegation in the answer that the Missouri, Kansas & Texas Railway was not a competing line, and, as the court could not judicially know that such was the case, the answer was fatally defective. It did not make out a state of case in which the defendant company could sell out to another. Without due statutory authority, a railroad company cannot transfer the right to operate its road so as to absolve itself from its duties

to the public, or its liability for the torts of the company by whom the road is operated. *Railroad Co. v. Underwood*, 4 S. W. Rep. 216; *Railway Co. v. Morris*, 3 S. W. Rep. 457. The State violated no contract previously made with the Missouri, Kansas & Texas R. Co., nor did it interfere with any right vested in that corporation, by forbidding the appellant to consolidate with it if it was a competing line. No such right existed at the time the act for the benefit of the Missouri, Kansas & Texas R. Co. was passed; and no contract authorizing the consolidation was then made in reference to the defendant company, for at that time the latter was not in existence. Public grants must be strictly construed. Nothing passes to the grantee by implication. We must not construe a grant of this character so as to tie up the hands of the State, and forbid it from imposing restrictions upon private corporations to be chartered in the future. Such restrictions are prescribed for the good of the whole community; and the State must not be held to have abdicated, for the benefit of a single corporation, the power to impose them for the future, when there is no special provision to that effect, if, indeed, this can be done at all. *Bridge v. Bridge*, 11 Pet. 420. The charter of the East Line & Red River R. Co., as amended, provided that it should not sell out to a competing line. This it contracted not to do. Upon what principle, then, can it plead that it was released from this obligation on its part, and hold the State to those which it assumed? Certainly not for the reason that the rights of another company will be thereby violated. The State did not contract with the appellant that it would not interfere with the rights of others, but only with those of the appellant. The State has not impaired her contract with the appellant, and it has not the right to break its contract, and hence could not sell out to another company unless the railroad of the latter was not in competition with that of the appellant. Besides, the act in relation to the Missouri, Kansas & Texas Company required that, in order that it might purchase other roads, a majority of its stockholders, and those of the company selling out to them, should agree to the sale. The stockholders of the appellant company could not agree to sell to the Missouri, Kansas & Texas Company if its line competed with that of the appellant, as this was forbidden by statute, and their agreement was *ultra vires* and void. The first assignment not well taken.

The second complains of the following charge given below: "If the jury believe from the evidence that plaintiff was, at the time alleged in the petition, a passenger on defendant's

train from McKinney to Greenville, and that when said train arrived at Greenville, and stopped, plaintiff, without any unavoidable delay, was in the act of leaving the passenger car, and before a reasonable time had been afforded him to do so, the defendant's servants and employees ran a switch engine against the car in which plaintiff was, with such force and violence as to throw plaintiff down, and inflict upon him personal injuries, then the jury should find for the plaintiff," etc. It was in proof that the appellee, some time before receiving the injuries on account of which this suit was brought, had been hurt by a fall which occurred while he was in the employ of parties who had a construction contract with the Gulf, Colorado & Santa Fe R. Co., and that he had been sent to a hospital in Galveston for treatment. After remaining there several weeks, he left for Greenville, in Hunt county, and was getting off the train of appellant at that place when his injuries occurred. The injury was caused by the running of a switch-engine against the car from which the appellee was attempting to alight, which caused him to be thrown across the seats of the car, thereby severely injuring his hip and other parts of his body. The objection to the charge is that the appellant's liability was made to depend upon whether the force of the engine was sufficient to throw the plaintiff down, and not whether it was sufficient to throw down a person of ordinary physical ability. The charge as given is correct in law. A railroad company owes a duty to others besides persons of ordinary physical ability. They are presumed to know that persons in feeble health, old or decrepit, travel upon their trains, and they must exercise care accordingly. The charge being correct law as a general proposition, if the appellant wished it to be framed with special reference to the supposed enfeebled condition of the appellee, it should have asked a charge of the court adapted to its view of the case. It may be added, however, that there is little or nothing in the evidence to show that the plaintiff could have withstood the shock if he had been in good physical condition, for others, not shown to be unsound, were thrown down by the violence of the concussion. We think the assignment not well taken.

The following portion of the charge is also complained of :
 "Or if the defendant's servants or employees were not guilty of any negligence in running the switch-engine against the car in which plaintiff was,—that is, if the plaintiff had been allowed a reasonably sufficient length of time, under the circumstances, to leave and alight from said car before the switch-engine approached

Injuries to
persons in
feeble health
—Degree of
care.

Failure to give
reasonable
time to alight.

it,—and if said switch-engine was brought into contact with said car with only such degree of force as was necessary to make the coupling thereto, then the plaintiff would not be entitled to recover;” because it required the defendant to show not only that the plaintiff had been an unreasonable length of time in leaving the train, but also that the switch-engine was driven against it with more force than was necessary in order to make a coupling. The clause of the charge objected to is only a portion of the fourth instruction given to the jury. The whole of this instruction must be taken in connection, in order to arrive fully at the meaning of the court. In another portion of it the judge told the jury, in effect, that they must believe that the collision occurred before the plaintiff had been allowed a reasonable time to leave the train, in order to find a verdict in his favor. This, taken in connection with the clause complained of, could not possibly have led the jury into the belief that the plaintiff could recover if a reasonable time to alight from the train had been allowed him, though unnecessary force had been used in making the coupling. If the plaintiff could recover only in the event that the collision occurred before he had reasonable time to alight, he could not recover if such reasonable time had been allowed, no matter how unnecessary the force that produced the collision. Besides, the clause objected to states what is correct in law, and, if the appellant wished the language changed or qualified, it should have asked an appropriate special charge, which was not done.

The following portion of the charge is also assigned as error: “Or, if the defendant’s servants and employees were guilty of negligence upon the occasion in question, which [contributed] directly to the injuries complained of, yet, if the plaintiff might, in the exercise of ordinary care and caution, have seen the danger and avoided it, and his omission to do directly contributed to the injuries, then plaintiff was guilty of such contributory negligence as will prevent a recovery in this suit, unless the plaintiff’s injuries were caused by the wantonly reckless acts of defendant’s servants; or, unless the plaintiff was only guilty of slight negligence, and the defendant’s servants were guilty of gross negligence.” It is not complained that this charge is not good law, but that the facts did not warrant its being given, there being no proof that the defendant’s servants or employees were guilty of wanton recklessness or gross negligence. The plaintiff’s evidence showed that the train had stopped for breakfast, allowing 20 minutes for the meal, and that the passengers, including the appellee, commenced immediately to leave the car upon which he was riding; that

Negligence of conductor and brakeman—Submission of question to jury.

he went to the back door of the car, and found it locked, and then towards the front door, and was delayed in getting there by the narrowness of the space between the two tiers of seats, which did not admit of his passing by a lady and her children who were ahead of him. Although every reasonable effort seemed to have been made by these passengers to get off the train in proper time, yet they were left to take care of themselves by the conductor, who had gone off, thinking that every passenger had got off the train. The brakeman, whose duty it was to watch the switch engine, saw it coming, but did nothing to notify those in charge of it that the collision might injure passengers in the act of alighting from the cars. It was certainly an act of carelessness on the part of the conductor to leave his train before the passengers had reasonable time to get off the cars, when he knew that a switch-engine was to be coupled to it, without giving them any notice of the danger to which they might be subjected. It was gross neglect on the part of the brakeman to allow the engine to be run against the train with such violence as would endanger the safety of the passengers, when it was in his power, and part of his duty, to prevent the occurrence. These careless acts of the conductor and brakeman, without reference to other facts that might be mentioned, justified the court in submitting the question of gross negligence to the jury.

It is finally objected that the court gave this charge to the jury: "If the jury find that plaintiff had been injured in November, 1885, and remained until February, 1886, in the hospital in Galveston, and left the hospital at that time, and at the time his knee was so far recovered it would have gotten well, and that he was afterwards, in March, 1886, injured by the negligence of appellant; if the jury believe that at that time the plaintiff had so far recovered from his prior injury that with ordinary care it would have gotten well, or that it was well, and that without fault on the part of plaintiff it was hurt by the negligence of defendant so as to render it stiff, and permanently so,—the defendant would be liable for the injury so occurring." It is objected that this charge assumes as a fact that, prior to his injury at Greenville, the appellee had been injured only in the knee, whereas he had been injured in the hip also. The court had already charged that, if plaintiff's injuries were received prior to his becoming a passenger on defendant's train, they must find for defendant. This would include hip injuries, as well as others. Besides, there was no proof in the record that the plaintiff's hip had been injured before he took passage on appellant's train. The doctors who treated him at Galveston say that he was injured only in

Former injuries of plaintiff—Instruction.

the right ankle and left knee. Appellee says himself that he was injured only in these parts, and that he was well before he left the hospital. Dr. Gilbert, physician for appellant, examined the appellee a year after he received the injuries for which suit was brought. He thought the injury to the knee might have affected the hip. We cannot say that the court was bound to give any weight to the opinion of a physician, who had not seen the plaintiff when suffering from his former wounds, to the effect that there was a bare possibility that his hip might have been involved in the injuries, when positive proof from those who had every opportunity of knowing showed conclusively that no such effect had been produced.

We see no error in the judgment, and it is affirmed.

Injury to Diseased or Disabled Persons.—See *Owens v. Kansas City, etc., R. Co.*, 33 Am. & Eng. R. R. Cas. 524; note, 530.

Duty to Stop Train a Reasonable Time to Allow Passengers to Alight.—See *Raben v. Central Iowa R. Co.*, and note, 33 Am. & Eng. R. R. Cas. 520, 522.

GRAVILLE

v.

MANHATTAN R. CO.

(*New York Court of Appeals, May 10, 1887.*)

Passenger—Riding on Platform—Request to go inside.—It is the duty of a passenger standing on the platform of a railroad car to go inside the car when requested to do so by a person having charge of the train.

APPEAL from the General Term of the Court of Common Pleas by New York City.

Action of Paul Graville against the Manhattan R. Co. to recover damages for assault and battery committed by one of defendant's servants upon the plaintiff while travelling upon defendant's elevated railroad. The defendant appeals from a judgment of the General Term affirming a verdict and judgment for plaintiff at the trial term for \$535.43. The opinion states the case.

Edward S. Rapallo for appellant.

L. A. Gould for respondent.

PER CURIAM.—The counsel for the defendant requested the

court to charge the jury that although there were no seats inside the car and people were standing therein, yet if there was room for the plaintiff, he was bound to go there. The court refused to charge as requested, and to this refusal the counsel for the defendant excepted. We are of opinion that the defendant was entitled to this instruction and that the exception was well taken.

It appears from the plaintiff's testimony that he boarded a train going north, at Houston Street, at about six o'clock

Facts. Sunday evening. The car at the time was crowded and the plaintiff with other passengers stood on the platform. When the train reached Thirty-fourth Street the brakeman requested the plaintiff and the other passengers on the platform to go inside the car, but as there was no room in the car at that time the plaintiff did not do so. Passengers got out of the car at Forty-second Street, and on the train leaving that station the conductor requested the plaintiff to go inside, but he declined to do so. The conductor or brakeman then pushed the plaintiff inside the car. When the train reached Forty-seventh Street the plaintiff, as he testifies, passed from inside the car on to the platform for the purpose of leaving the train at that station, and when he reached the platform the conductor took hold of him and pulled him off the car, and a struggle ensued between the plaintiff and the conductor, the details of which it is unnecessary to state.

The plaintiff on the trial testified to the act of the brakeman in pushing him into the car, and to the subsequent assault at the station, and relied on both acts as constituting grounds of recovery.

Both of the transactions were litigated without objection and were submitted by the court to the jury and they rendered a general verdict. The request to charge related to the first assault; and if it should have been granted, the error cannot be disregarded. The counsel for the defendant on the argument sought to justify the act of the brakeman in pushing the plaintiff into the car, on the ground that his standing on the platform was a dangerous act and interfered with the proper management of the train, and that the brakeman was authorized to use necessary force to compel the plaintiff to go inside the car if there was standing room, although all the seats were occupied.

This question is not, we think, open to the defendant on this record. The court charged the jury that the brakeman had no right to force the plaintiff inside the car upon his refusal to go inside, and that the only remedy was to eject the plaintiff from the car on reach-

**Right to force
plaintiff in
car.**

ing the next station. The counsel for the defendant did not except to this ruling, but by his silence acquiesced in its correctness; and it must be regarded as the law of the case. But assuming that the law in this respect was correctly stated, as to which there is, it seems to us, room for serious doubt, nevertheless we think the court should have charged the proposition requested.

Whether on the plaintiff's refusing to comply with the request of the brakeman to go inside the car, the latter was authorized to use force to compel him to do so, is a distinct question. It is a matter of common knowledge that it is considered unsafe for passengers to ride on the platform of a running train. By so doing they expose themselves and the other passengers to unnecessary danger. The law exacts of carriers of passengers the highest degree of care for their safety. The control of trains is necessarily placed in the hands of employees. It is impossible to foresee all the exigencies which may demand prompt action on their part, to avert danger or accident. The safety of passengers on railroads requires that they should comply with reasonable regulations and acquiesce in reasonable directions of the persons to whom the management of the train is committed.

It is obvious that the crowding of passengers on the platform of a steam railroad car may seriously embarrass the trainmen in the performance of their duties; and it is, we think, the plain duty of a passenger standing on a platform, to go inside the car when requested so to do by a person having charge of the train.

The request to charge was material, as bearing upon the question of damages, assuming that the use of force by the brakeman was not justified. Although the brakeman may have been mistaken as to his authority to enforce a compliance with the request made to the plaintiff, yet it was the duty of the plaintiff to comply; and his refusal tends to mitigate and explain the conduct of the brakeman and to show that the assault was not wanton or malicious.

The fact that there were no unoccupied seats in the car did not, we think, change the duty of the plaintiff to go inside. If he had any well founded complaint against the company for not providing adequate accommodations for passengers, this did not, we think, release him from the duty of leaving the platform and going inside the car, although there was standing room only. The car was crowded when the plaintiff entered it at Houston Street. He placed himself immediately in a position where he was compelled to submit to some inconvenience, and he was not freed from the obligation to obey the reasonable directions of the trainmen, made

with a view to the general convenience and safety, because there was no vacant seat.

For the error in the refusal to charge, the judgment should be reversed and a new trial granted.

All concur.

Injury to Passenger on Platform—Inconsistent Findings.—In the case of *Kelly v. Chicago & N. W. R. Co.*, 35 N. W. Rep. 538, decided by the supreme court of Wisconsin, in an action to recover damages for injuries caused by the negligence of defendant in suddenly starting a train while plaintiff was on the platform of a car in the act of alighting, the jury, by special verdict, found that plaintiff "could, by the use of ordinary care and a reasonable effort on her part, have turned back or retained her place on the steps with safety to herself;" also that plaintiff "was not guilty of any want of ordinary care in leaving the train which contributed to produce the injury complained of;" also that she was damaged in the sum of \$2,000. The court set aside the verdict, on the ground that it was inconsistent, and ordered a retrial. *Held*, that defendant had no cause to complain of the action of the court. The findings of the jury were evidently inconsistent, or, if not so, they clearly acquitted plaintiff of negligence, in which case judgment should have gone for plaintiff. In any case, the findings could not be construed as holding plaintiff guilty of contributory negligence.

FICK

v.

CHICAGO AND NORTHWESTERN R. CO.

(*Wisconsin Supreme Court.*)

Master and Servant—Ticket Agent—Temporary Substitute—Assault.—A person left by the regular ticket agent in charge of the ticket office during the absence of the latter is the servant of the railroad company for the issuing of tickets, and the company is liable for an assault committed by him during an altercation regarding the making of change on the sale of a ticket.

Verdict—Special Finding—Conclusion of Law.—A special finding by the jury in action against a master for his servant's tort that the latter was not acting in the course of his employment at the time, is a finding of a conclusion of law, and may be set aside if it is inconsistent with the other special findings.

APPEAL from Circuit Court, Monroe County.

Action by John Fick against the Chicago & Northwestern R. Co. to recover damages for an assault committed by one of the defendant's servants. Defendant appeals from a judgment

entered for the plaintiff upon the special findings of the jury. The opinion states the case.

Bleekman & Bloomingdale for respondent.

Jenkins, Winkler, Fish & Smith for appellant.

COLE, C.J.—The plaintiff had purchased a ticket at the ticket office at Wilton for his transportation to Norwalk, so the relation of carrier and passenger existed at the time of the assault. It is needless to say that the company and its agents owed him fair and proper treatment while this relation existed. The jury found that one Fred E. Davis was the station agent at Wilton when the ticket was purchased; that Edward W. Davis was employed at Wilton to carry the mail from the trains to the post-office, and was employed in no other capacity; that, at the time in question, the plaintiff purchased of Edward W. Davis, temporarily in the ticket office at Wilton by permission of Fred E. Davis, a ticket to Norwalk, the price of which was 20 cents, and tendered him 50 cents in payment thereof; that Edward W. Davis returned to the plaintiff too small an amount of change, and informed him that they had no change, and would either send it to him, or hand it to him when he came again; that Edward W. Davis committed the first assault upon the plaintiff at this time; and that the plaintiff was intoxicated.

Facts.

Upon these simple facts the conduct of the employee, Edward W. Davis, in assaulting the plaintiff, would appear to be wholly indefensible, and without any legal excuse. The plaintiff had given him money to pay for his ticket, and he was entitled to have his correct change returned. It was natural that he should ask for it, and persist in demanding it. The agent had no possible right of justification for assaulting him because he did insist upon the correct amount of change being returned. Of course, the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against the violent acts or misconduct of its agents. There would probably be no controversy as to the correctness of this view of the law, or as to the liability of the defendant for the wilful act of a servant while acting in the course of his employment.

Liability of company for assault.

It is said that Edward W. Davis was not the station agent at Wilton, but was merely employed to carry the mails from the trains to the post-office, and was employed in no other capacity. But he was in the ticket office, sold the plaintiff a ticket, and received pay therefor. It is alleged in the complaint that the plaintiff went to the station for the purpose of taking passage on the train due in a few minutes, and purchased

Substitute for ticket agent—Company liable for assault of.

a ticket of an employee in charge of the office. Now, while it may be true that Edward W. Davis was not the regular ticket agent, yet under the circumstances he must be regarded as authorized to issue the ticket. The special verdict finds that at this time the fracas occurred, or the unlawful assault was committed. Now, to say that Edward W. Davis was a servant of the defendant in selling the ticket and receiving pay for it, but while in the act of refusing to return the proper change, and in making the assault, was acting outside the course of his employment, is refining too much upon the transaction. It is not as though the fracas had occurred at a subsequent time and place disconnected with the act of selling the ticket and making change. Of course, the rule is familiar that the master is liable for the torts of his servant only when they are committed in the course of his employment, and we do not intend to disregard that rule here. It is often difficult to determine what acts should be deemed within the course of the employment; but it seems to us, upon the facts, that the assault made upon the plaintiff is one for which the defendant is liable. It would be unjust to hold that the defendant, which was bound to use all due diligence to carry the plaintiff safely to his destination, was not bound to protect him against the violent act of its servant under the circumstances of the case. True, the jury, in answer to the fourteenth question, find that the striking of the plaintiff by Edward W. Davis was not done by him in the course of his employment. But this, in view of the other findings, amounts only to a conclusion of law, and is not controlling as to the fact. It is like the question presented in *Hogan v. Chicago, Milwaukee & St. Paul R. Co.*, 59 Wis. 139, where it was held that, if the special findings by the jury and the averments of the complaint conclusively show that the defendant was free from any negligence causing the injury complained of, a finding in the verdict that the defendant was guilty of such negligence will be treated merely as an erroneous conclusion of law, and will have no weight in determining what judgment should be entered. So here, where the other findings show that Edward W. Davis was acting in the course of his employment when he committed the unlawful act complained of, the fourteenth finding must be treated as an erroneous conclusion of law, which can have no weight in determining what judgment shall be entered.

Special finding—Conclusions of law.

The judgment of the circuit court is affirmed.

Assaults by Servants upon Passengers.—A carrier of passengers is bound by his contract to use all the diligence and care that human prudence and foresight can provide, and to protect his passengers from insult or assault by his servants or strangers during the course of the journey. *Flint v.*

Norwich & N. Y. Transportation Co., 34 Conn. 554; Frink *v.* Schroyer, 18 Ill. 416; Goddard *v.* Grand Trunk R. Co., 57 Me. 202; s. c., 2 Am. Rep. 39; Landreaux *v.* Bel, 5 La. 434; Moore *v.* Fitchburg R. Co., 70 Mass. (4 Gray.) 465; Weed *v.* Panama R. Co., 17 N. Y. 362; Brand *v.* Schenectady & T. R. Co., 8 Barb. (N. Y.) 368; Pittsburgh, F. W. & C. R. Co. *v.* Hinds, 53 Pa. St. 512; Pennsylvania R. Co. *v.* Vandiver, 42 Pa. St. 305; Milwaukee & M. R. Co. *v.* Finney, 10 Wis. 388; Chamberlain *v.* Chandler, 3 Mason C. C. 242; Seymour *v.* Greenwood, 7 Hurl. & N. 354. An assault upon a passenger by the steward of a steamboat and his assistants, growing out of a dispute with another passenger, who, the steward claimed, had not paid for his supper, is a tort for which the carrier is responsible. Bryant *v.* Rich, 106 Mass. 180. And the carrier is also responsible for an assault by the clerk of a steamboat upon a passenger who had given up his ticket, but who, the clerk claimed, had been in hiding under the boiler. Sherly *v.* Billings, 8 Bush (Ky.), 147; see also Pendleton *v.* Kinsley, 3 Cliff. C. C. 416.

In Collection of Fares.—The company is liable for the act of the conductor in seizing the property of a passenger, for the purpose of compelling payment of the fare, as, in one case, for the seizing of the parasol of a female passenger. Ramsden *v.* Boston & A. R. Co., 104 Mass. 117; s. c., 6 Am. Rep. 200. The company must answer for an assault committed by a brakeman, who is acting as conductor for the time being in collecting fares. Goddard *v.* Grand Trunk R. Co., 57 Me. 202; Moore *v.* Fitchburg R. Co., 70 Mass. (4 Gray) 465; Milwaukee & M. R. Co. *v.* Finney, 10 Wis. 388. And it is liable for injuries inflicted by the use of greater force by the conductor than was necessary to expel a passenger. Higgins *v.* Watervliet, T. & R. Co., 46 N. Y. 23; s. c., 7 Am. Rep. 293.

Other Assaults.—A carrier is liable for an assault committed by a brakeman upon a passenger, although he be not acting within the scope of his employment. Hanson *v.* European & N. A. R. Co., 62 Me. 84; Goddard *v.* Grand Trunk R. Co., 57 Me. 202. Where a brakeman forcibly and violently pulled from the train a gentleman who had entered a car set apart for ladies, or gentleman accompanied by ladies, the company was held liable, the brakeman having been stationed at the cars for the purpose of directing the passenger which car to take. Peck *v.* New York C. R. Co., 6 T. & C. (N. Y.) 436. In an English case, a railway porter, under the erroneous belief that a passenger was in the wrong carriage, violently pulled him out of it, and it was held that the company was responsible. Bayley *v.* Manchester, S. & L. R. Co., L. R. 7 C. P. 415. A street car company was held liable for an assault committed by a driver upon a passenger who expostulated with the driver for assaulting a third person, not a passenger. Stewart *v.* Brooklyn & C. R. Co., 90 N. Y. 588; s. c., 12 Am. & Eng. R. R. Cas. 127; 43 Am. Rep. 185. If a driver in ejecting a person rightfully on the platform of a street car, wantonly assault him, the company is liable, although such person be not a passenger, such act being within the apparent scope of his authority. Shea *v.* Sixth Avenue R. Co., 62 N. Y. 180.

Wilfulness of the Act.—The wilfulness of the servant's act will not defeat the recovery. Wabash, St. L. & P. R. Co. *v.* Rector, 104 Ill. 296; s. c., 9 Am. & Eng. R. R. Cas. 264; Stewart *v.* Brooklyn & C. R. Co., 90 N. Y. 588; s. c., 12 Am. & Eng. R. R. Cas. 127; 43 Am. Rep. 185; Weed *v.* Panama R. Co., 17 N. Y. 362. Thus the court held the company liable for the act of a brakeman, who wilfully turned a jet of water upon a passenger for refusing to pay him for watering his hogs. Terre Haute & I. R. Co. *v.* Jackson, 81 Ind. 19; s. c., 6 Am. & Eng. R. R. Cas. 78. A passenger, on arrival at a station, took part in an altercation between some other passengers and the company's servants regarding a ticket. One of the company's employees seized him, ran him down an incline and kicked him

through the station door. It was held that the company was liable. *Walker v. South Eastern R. Co.*, 39 L. J. C. P. 346. It has been held that carriers are bound to protect their passengers against "obscene conduct, lascivious behavior, and every unmodest and libidinous approach." *Nieto v. Clark*, 1 Cliff. C. C. 145. See also *Chamberlain v. Chandler*, 3 Mason, C. C. 242. A verdict of \$1000 against a railroad for the act of the conductor of a passenger train in kissing a young lady, a passenger, without her consent, has been upheld. *Croaker v. Chicago & N. W. R. Co.*, 36 Wis. 657; s. c., 17 Am. Rep. 504.

Conflicting Cases.—It would seem that in the cases in which it has been held that the carrier was not liable for injuries wantonly inflicted by servants engaged in transporting passengers, the rule as to the carrier's responsibility as above stated has been overlooked or neglected. See *Wood on Mast. & Serv.* p. 652. In this category must be included the case of *Isaacs v. Third Avenue R. Co.*, 47 N.Y. 122; s. c., 7 Am. Rep. 418, which was an action to recover damages for the act of a street car conductor in pushing a female passenger from a street car upon her refusal to alight until the car had properly stopped. It would seem, too, that under the rule stated, the carrier would be bound to protect a passenger from, and be liable in damages for, an assault committed upon him with a hatchet by the baggage master of a railroad, and yet it has been held that, as the assault had not been committed in the course of the baggage-master's employment, the company was not liable. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110. It has likewise been held that the company was not liable for the wrongful and unauthorized arrest of a passenger by a station master. *Poulton v. London & S. W. R. Co.*, L. R. 2 Q. B. 534.

See, Generally, as to Assaults upon Passengers by Servants, *Williams v. Pullman P. Car Co.*, 33 Am. & Eng. R. R. Cas. 407; *Spohn v. Missouri Pac. R. Co.*, and note, 26 Ib. 252, 256.

SACHROWITZ

v.

ATCHISON, TOPEKA AND SANTA FÉ R. CO.

(*Kansas Supreme Court.*)

Passenger—Assault by Stranger—Liability of Company.—In an action against a railroad company it appeared that plaintiff, while standing upon the platform of one of the cars of a train, which he was about to enter as a passenger, was knocked off and robbed, just as the train started, by a person holding a lantern in one hand and a club in the other. It did not appear that the person committing the assault and robbery was an employee of the railroad company, otherwise than that he carried a lantern with letters on it, and wore a cap with a badge upon it; or that the assault was made in ejecting, or attempting to eject, the plaintiff from the cars, by any one connected with the operation of the train, or having any charge of the depot, its grounds, or the road; but, on the contrary, that the alleged assault was wholly disconnected with any service in which any

employee of the railroad company was engaged. *Held*, that the railroad company operating the train was not responsible for the wrongful acts committed upon the plaintiff, under a petition charging that the plaintiff was assaulted and injured by the servants and employees operating and controlling a train of the company.

ERROR to District Court, Reno County.

The opinion states the case.

W. T. Buckner for plaintiff in error.

Geo. R. Peck, A. A. Hurd, and C. N. Sterry for defendant in error.

HORTON, C.J.—This action was brought by the plaintiff in error to recover damages for personal injuries which he alleges he sustained through the conduct of one of the servants or agents of the defendant in error. Facts.

The defendant, in its answer, averred that the plaintiff sustained his injuries in attempting to climb upon a freight car while in motion, with the intention of riding on the car without paying any fare.

On the trial, the plaintiff gave evidence tending to show that he was a Hebrew, and had only being living in the United States some two years; that just previous to his injuries he had started to go from Pueblo to Kansas City, and had purchased a ticket to be transported from Pueblo to Kansas City over defendant's road; that he had a grip-sack containing his personal effects, which he shipped by express to Kansas City, not wishing to be bothered with it on the cars; that when he had reached a point between Hutchinson and Burrton, the conductor put him off the train he was riding on because he had either lost the pasteboard given him by a former conductor, or that conductor had taken it up; that when he was put off the train he had about five dollars in money; that he walked on to Burrton, reaching there shortly after noon; that while at Burrton he met a young man with whom he could talk a little, as this young man could talk German; that he gave this young man a half dollar in exchange for a cigar-case, and then walked around with him until towards evening, when they went into a private house and got a meal; that after this he left the young man, and walked south of town some distance, and while he was there the regular passenger train going east passed through Burrton; that shortly after 10 o'clock he came back towards the depot, and, as he came, he saw the emigrant train standing there, and he then concluded to purchase a ticket to go to Newton upon it; that he thereafter attempted to cross over the cars to the platform and to the station, which was on the other side, but, as he got upon the platform of one of the cars,

the cars started, and he gave up his attempt to get to the depot; that, just as the cars started, a man having a lantern with letters upon it, and a cap with a badge on it, holding the lantern in one hand, and a club in the other, jumped upon the same platform, and struck the plaintiff with both the club and the lantern, or with one, on the head, knocking him senseless on the ground; that plaintiff never saw the man before; that he had no words with him at the time. The only thing said by either preceding the blows was the words, "You God damned son of a bitch," uttered by the man who struck him; that plaintiff at the time could neither write, speak, nor understand English, and did not and does not know what the letters were which were on the lantern, or the badge on the man's cap; that he thought this man was a railroad man because he had a lantern with letters on it, and a cap with a badge on it; that was the only reason for saying or believing that he was a railroad man; that, after plaintiff had lain where he fell for two or three minutes, this same man came running towards him, and told him to get up, but plaintiff could not; that he seized the plaintiff, and, raising him up with one hand, went through his pockets with the other; that, as he did so, another man came running towards them, and, as this man came, the one who had hold of him dropped him and ran off towards the town, away from the direction in which the train was; that this other man coming up, an alarm was given, and the citizens came and carried him to Dr. McAtee's office, where Dr. McAtee and his brother dressed his arm and set the bones; that the next morning Dr. Smalt, who was in the employ of the defendant, came and examined the arm and the dressing, and stated that it was all right; that afterwards his arm had to be amputated because of the unskilful and negligent manner in which it was set.

The defendant gave evidence tending to show that between 10 and 11 o'clock on the night of June 26, 1882, a train called "emigrant train," consisting of engine, freight, and emigrant passenger cars, arrived at Burrton on its way east, and stopped there so that the engine could take water at the tank; that, as the rear of the train passed the depot, the conductor, hearing some one halloing as though he was hurt, caused the train to be stopped, and with the brakeman went to the spot where the noise proceeded from, and found two men, dressed and looking like tramps,—one of them was lying on the ground, apparently hurt and in pain, and the other was holding this man's head up and crying; that the one who was not hurt, upon inquiry as to what was the matter, stated, in substance, that he and the injured man, whom he called "Joe" and "Partner," had been beating their way from

Denver east, stealing rides when they could on the cars, and that they had been put off a train early that morning at Burrton, and that they had watched every opportunity to get upon this train, and started to climb up the side of one of the freight cars on the ladder after the train had started, and that the man who was hurt was clumsy and awkward about such business; that, as he reached the top, he fell and struck the ground, and severely hurt himself; that the conductor despatched the man who was not hurt in search of a doctor, and soon a doctor arrived with some of the citizens of the town, and the man was carried to the doctor's office, where it was found that his arm was broken badly; that after a while this arm was set, and the plaintiff was left in the doctor's office that night, in care of the man who was with him; that afterwards it was ascertained the arm had not been properly set, and that amputation was necessary in order to save the plaintiff's life, and therefore his arm was amputated; that when the plaintiff was taken to the doctor's office, the city marshal, who was present, searched his pockets for such valuables as he might have, for the purpose of keeping them for him, but discovered nothing except a loaded revolver.

The case was submitted to the court with a jury, and the jury returned a verdict in favor of the defendant. The court subsequently approved the verdict, and rendered judgment accordingly. The plaintiff, in his proceedings in error, alleges that the district court improperly received upon the trial the declarations of a person known as "Cooney," who claimed to be the "partner" of the plaintiff, as to the manner of his receiving his injuries. Exceptions were also taken to certain instructions.

A careful examination of the record convinces us that the court below could not have committed any error prejudicial to the rights of the plaintiff. After the plaintiff had produced all of his evidence, the defendant demurred thereto, and the court overruled the demurrer. Thereupon the defendant introduced the evidence heretofore recited, tending to show that the plaintiff was accidentally injured while endeavoring to climb up the side of a car in motion, with the intention of stealing a ride thereon. The plaintiff did not show, upon the trial, that the person whom he alleges knocked him down and robbed him was the servant or agent of the defendant; but even if we assume that because the man who assaulted him had a lantern in his hand with letters on it, and wore a cap with a badge, that therefore he was an employee of the defendant, it does not follow that he was acting in the course of his employment in making the assault. It is not claimed that

Plaintiff's evidence does not sustain the action.

he was employed directly to make the assault.* It does not appear that he had charge of the train, or of the car upon which the plaintiff was standing when he claims he was knocked off. The plaintiff testified that the person who struck and robbed him did not run towards the train after he had got his money, but ran the other way; that he went down town. The evidence of the plaintiff is insufficient in not showing that the person who assaulted him was in the employ of the defendant. Even if we concede he has shown that much, yet his evidence is fatally defective in not showing that the wrongful acts alleged, were done by the servant or agent of the defendant in the course or within the scope of his employment. *Hudson v. Railway Co.*, 16 Kan. 470. This action was not brought against the defendant for its negligence in not protecting the plaintiff while a passenger on its train from the assault of some third party; and it nowhere appears in the evidence that he was thrown from the train by any person connected in any way with its operation.

The evidence offered by the defendant, after the demurrer was overruled, did not supply the omissions in the plaintiff's case. Upon the evidence of the plaintiff, the trial court would have been justified in withdrawing the case from the consideration of the jury, and in deciding it in favor of the defendant. After all the evidence had been presented on both sides, the court would have been justified in instructing the jury to render a verdict for the defendant.

As there is no evidence in the record tending to show that the assault and robbery grew out of any service in which any employee of the defendant was engaged, or that was in the line of the duty of any employee of the defendant, but appears to have been clearly disconnected therefrom, the judgment rendered is the only one that the evidence will support. Under these circumstances, it is unnecessary to discuss the various alleged errors presented in the briefs of plaintiff. The judgment of the district court will be affirmed.

All the justices concurring.

Assaults by Fellow-passengers and Strangers.—The carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, when, by the exercise of proper care, the act of violence might have been foreseen and prevented. *Holly v. Atlanta St. R. Co.*, 61 Ga. 215; s. c., 7 Rep. 460; *New Orleans R. Co. v. Burke*, 53 Miss. 200; *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 102; *Britton v. Atlanta & C. R. Co.*, 88 N. C. 536; s. c., 18 Am. & Eng. R. R. Cas. 391; *Pittsburgh R. Co. v. Pillow*, 76 Pa. St. 510. It has been held that a passenger has a right of action for injuries received at the hands of a mob who, defying the order of the conductor, entered the cars at a wayside station, and commenced an affray, which resulted in an injury to the passenger

Pittsburgh, F. W. & C. R. Co. *v.* Hinds, 53 Pa. St. 512. It has also been held that a railroad company is responsible to a passenger for injuries sustained by the discharge of a musket by one of a party of soldiers on board the steamboat, who was engaged in a struggle with another soldier. *Flint v. Norwich & N. Y. Transportation Co.*, 34 Conn. 554. If the conductor simply hurries the assaulted passenger into another car, and does not attempt to eject the guilty persons, or prevent further violence, he does not fulfil his duty. *New Orleans St. L. & C. R. Co. v. Burke*, 53 Miss. 200. But a railroad company is not liable to a female passenger for profane and obscene language and indecent exposure of the person by a mere intruder into a car at a station, if the acts were done under such circumstances that the company could not have foreseen and prevented them. *Batton v. South & N. Ala. R. Co.*, 77 Ala. 591; *s. c.*, 23 Am. & Eng. R. R. Cas. 514; 54 Am. Rep. 80.

See also *Spohn v. Missouri Pac. R. Co.*, and note, 26 Am. & Eng. R. R. Cas. 252, 256; *Chicago & A. R. Co. v. Pillsbury*, and note, 26 Ib. 241, 256; *Felton v. Chicago, etc., R. Co.*, 27 Ib. 229; *Chicago & A. R. Co. v. Pillsbury*, 31 Ib. 24.

MYKLEBY

v.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R. CO.

(*Minnesota Supreme Court, June 26, 1888.*)

Passenger—Ejection—Assault—Pleading—Variance.—A complaint alleged that plaintiff was a passenger on defendant's train, and that the agents of defendant in charge of the train wilfully, maliciously, forcibly, and violently, and while the train was running at a rapid rate of speed, kicked and ejected him from the steps of the car, on the ground, and under the cars, whereby he sustained personal injuries, for which he seeks damages. *Held*, that the cause of action thus pleaded was one in tort; the *gravamen* of the complaint being an intentional and personal assault and battery, and the fact that the evidence showed that plaintiff was a trespasser and not a passenger on the train (the wrongful assault being proved as alleged) constituted neither a failure of proof nor a material variance between the complaint and the evidence.

APPEAL from District Court, Ramsey County.

Action by Erick P. Mykleby against the Chicago, St. Paul, Minneapolis & Omaha R. Co. to recover damages for personal injuries. Plaintiff appeals from an order granting a motion by defendant to dismiss the action.

The opinion states the case.

Lomen & Torrison for appellant.

J. D. Howe, S. L. Perrin and C. D. O'Brien for respondent.

MITCHELL, J.—Aside from much irrelevant matter, the allegations of the complaint are that the plaintiff was a passenger, and was received as such by defendant, on one of its coaches to be by it conveyed from Eau Claire to Black River Falls; that, having left the train for a temporary purpose at an intermediate point, he proceeded again to enter one of the passenger coaches, when “the defendant, by its agent and servants then and there in charge of the train, and acting within the scope of their employment, prevented the plaintiff, after he had boarded one of said cars, and gained the steps thereof, from entering the same, and then and there unnecessarily, without cause, wilfully, maliciously, forcibly, violently, and brutally, and while said train was moving at a rapid and dangerous rate of speed, pushed, kicked, and ejected this plaintiff from and off the steps of said coach, threw him to the ground under said cars, and caused the wheels of said cars to pass over one of the legs of plaintiff, crushing and mangling it so that it was necessary to amputate the same.”

Upon the trial the plaintiff introduced evidence tending to prove that he was, by defendant's brakeman, kicked and thrown from the steps of the coach in the manner alleged, but failed, as the trial court thought, to prove that he bore to defendant the relation of passenger; the court holding that the evidence showed that, in attempting to enter the coach he was a mere trespasser, and for this reason granted defendant's motion to dismiss the action upon the ground of variance between the proofs and the allegations, and because the plaintiff had failed to make out the cause of action pleaded. The learned judge took the view that the complaint was founded upon the theory that the relation of carrier and passenger existed between the parties, and that its whole scope and purpose was to recover for an invasion of plaintiff's rights as a passenger; in other words, as we understand him, that the action was one *ex contractu*, to recover

damages for breach of the contract of carriage, whereas, being not a passenger, but a trespasser, plaintiff's evidence tended to make out only a cause of action in tort for an assault and battery, and therefore the cause of action set up in the complaint was “unproved, not in some particulars only, but in its entire scope and meaning” so as to amount to a total failure of proof. In this view we are unable to concur. We think the action was clearly one in tort. The *gravamen* of the complaint was not the failure to carry plaintiff to his destination, but the wilful and malicious kicking and throwing him from the moving car on to the ground, so as to endanger

Action one in tort and not for breach of contract.

his life and limb. In other words, the cause of action pleaded is a personal and intentional assault and battery. If committed as alleged, it would be entirely immaterial whether plaintiff was a passenger or a trespasser. If it were the latter, defendant could have no right to put him off the cars while in rapid motion, so as to endanger his life, and would no more be justified, under such circumstances, in ejecting him from the steps than from the interior of the car. The cause of action, both as pleaded and proven, was purely one in tort, and maintainable without reference to any contract relation between the parties. The gist of the action was not the breach of contract, but the assault. *Sanford v. Railroad Co.*, 23 N. Y. 343; *Brown v. Railway Co.*, 54 Wis. 342; *Whittaker v. Collins*, 34 Minn. 299. We think there was neither a failure of proof nor any material variance between the allegations and the evidence. Order reversed.

Assaults upon Passengers by Servants of Company.—See *Fick v. Chicago & N. W. R. Co.*, *ante*, 378, and note, 380.

BUCHER

v.

CHESHIRE R. Co. *et al.*

(125 U. S. 555.)

Passengers—Personal Injuries—Sunday Law—Federal Courts.—The adjudications of the supreme court of Massachusetts, holding that a person engaged in travel on the Sabbath day contrary to the statute of the State, being thus in the act of violating a criminal statute, cannot recover against a corporation upon whose road he travels for the negligence of its servants, establish a local law of that State which will be followed by the Federal courts in actions arising therein.

Same—State Court—Nonsuit—Res Adjudicata.—A passenger who was injured while travelling in Massachusetts on the Sabbath brought an action against the company in the State court. The jury found that he was travelling on an errand of necessity or charity, and brought in a verdict in his favor. On appeal, the Massachusetts supreme court held that the facts did not show that the errand was one of necessity or charity, and remanded the case for new trial. The plaintiff then became nonsuit in the State court, and brought a new action in the Federal circuit court. *Held*, that the character of the errand was properly excluded from the consideration of the jury in the Federal court, having been passed upon and decided in the trial in the State court.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

Action by Theodore P. Bucher against the Cheshire R. Co. and the Fitchburg R. Co. for damages for personal injuries sustained by plaintiff. The plaintiff brings error to review a judgment for the defendants.

A. A. Ranney for plaintiff in error.

Chas. A. Welch for defendants in error.

MILLER, J.—This is a writ of error to the circuit court of the United States for the district of Massachusetts. The plaintiff in error was plaintiff in that court, and sought to recover of the defendants for injuries which he sustained by reason of their negligence while travelling upon their roads. The court on the trial substantially instructed the jury that the plaintiff could not recover because the injury complained of occurred while he was travelling upon the Sabbath day, in violation of the law of the State of Massachusetts. A suit between the same parties in regard to the same transaction had been brought in the supreme court of that State, in which, on a trial before a jury, the plaintiff obtained a verdict. This was carried to the court in bank, and was there reversed and sent back for a new trial. The plaintiff then became nonsuit in the State court and brought the present action in the circuit court of the United States.

It is important to inquire what was at issue upon the trial in the State court. There the defendant set up the law of the State found in Gen. St. c. 84, § 2, which is as follows: "Whoever travels on the Lord's day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars;" and insisted that the plaintiff, being in the act of violating that law at the time the injury occurred, could not recover. On the 15th of May, 1877, after the plaintiff was injured, the legislature of Massachusetts passed a statute declaring that this prohibition against travelling on the Lord's day should not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by the person so travelling. St. Mass. 1877, c. 232. The supreme court of that State had decided previous to this, in *Stanton v. Railroad Co.*, 14 Allen, 485, a similar case, that the plaintiff, being engaged in a violation of law, without which he would not have received the injury sued for, could not obtain redress in a court of justice. Also, in *Bosworth v. Swansey*, 10 Metc. 363, and in *Jones v. Andover*, 10 Allen, 18. In the trial of the case now under consideration, before the

jury in the State court, the plaintiff does not seem to have controverted the general doctrine thus declared, but insisted that the present case did not come within the statute, because, first, the act of May 15, 1877, had declared that travelling on Sunday should no longer be a defence to actions for injuries suffered by reason of the negligence of carriers of passengers, although this statute was passed after the accident occurred upon which the right of action was founded; and second, that at the time he was injured he was, within the meaning of the statute, travelling upon an errand of charity or necessity, specially excepted from its provisions. The court below sustained both of these propositions of the plaintiff, and the court in bank reversed the trial court upon both of them. It held that the act of May 15, 1877, did not govern a case where the injury had occurred before its passage; that it was not retroactive; and also held that the facts set out in the bill of exceptions did not show that the plaintiff was travelling at the time of the accident either from necessity or for charity. It may be as well to state here that the facts found in the bill of exceptions relating to this latter question, as it was presented before the supreme court of Massachusetts, were identical with those appearing in the bill of exceptions of the case now before us, being in both cases the plaintiff's own statement of his reasons for travelling on that day.

Upon the trial in the circuit court of the United States the judge was requested by the plaintiff to charge the jury that the circumstances detailed in the testimony of plaintiff and found in the bill of exceptions concerning the illness of his sister in Minnesota, of which he had received knowledge by letter, and had replied that he would meet her in Chicago at a certain time, and that, having been delayed by accidental circumstances, the travel on Sunday, when he was injured, became necessary to enable him to fulfil that promise, were sufficient to be submitted to the jury in order that they might pass upon the question of whether or not this act of travelling on the Lord's day was a work of necessity or charity. This the court declined to do, saying that the same question having been submitted to the jury in the trial in the State court, and having been passed upon by the supreme court of the State, he did not consider that there was evidence sufficient to go to the jury upon that subject. This is one of the assignments of error now before us, and upon this point we are of opinion that the court below ruled correctly. It is not a matter of estoppel which bound the parties in the court below, because there was no judgment entered in the case in which the ruling of the State court was

Reasons for
the case not
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the statute.

Refusal of Fed-
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made, and we do not place the correctness of the determination of the circuit court in refusing to permit this question to go to the jury upon the ground that it was a point decided between the parties, and therefore *res judicata* as between them and the present action, but upon the ground that the supreme court of the State in its decision had given such a construction to the meaning of the words "charity" and "necessity" in the statute as to clearly show that the evidence offered upon that subject was not sufficient to prove that the plaintiff was travelling for either of those purposes. The court in its opinion, which is reported in *Bucher v. Railroad Co.*, 131

Massachusetts
decision as to
"necessity"
and "chari-
ty" followed.

Mass. 156, said: "The act of plaintiff in thus travelling on the Lord's day was not an act of necessity within the meaning of the statute. . . . In order to constitute an act of charity, such as is exempted from the Lord's day act, the act which is done must be itself a charitable act. The act of ascertaining whether a charity is needful is not the charity; but, so far as the statute is concerned, the only question in that case would be, is this act a necessary act? That involves the question, whether the act is one which it is necessary to do on the Lord's day; and no previous neglect to obtain the requisite information on a previous day creates a necessity for obtaining it on the Lord's day." After citing other cases which had been decided in that court, it was further said: "It is apparent that the plaintiff's duty to his sister was made subservient to his secular business. We are, therefore, of opinion that the ruling should have been given that there was no evidence which would justify the jury in finding that the plaintiff was travelling from necessity or charity within the meaning of the statute." Taking, therefore, this construction of the language of the statute, as well as prior decisions to the same purport in which we think we are bound to follow the supreme court of the State, we agree that the record in this case as in that does not furnish evidence which should have gone to the jury upon that branch of the subject.

The other assignment of error, in regard to the effect of travelling on the Lord's day in violation of the statute of Massachusetts, submitted as a defence to what would otherwise be a liability of the railroad for the negligence of its servants, presents the matter in a somewhat different aspect. It is not easy to see that there was anything in the case as it arose in the circuit court which required a construction of the meaning of that statute, after eliminating what has just been suggested as to the signification of the words "necessity" or "charity." The remainder is a short prohibition against travelling upon

Travelling on
Sunday as a
defence—Mas-
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cases.

the Lord's day, and provides for the imposition of a penalty for so doing. This is very plain; it admits of no doubt as to its meaning, and its validity has never been controverted. When, therefore, the supreme court of Massachusetts, in a long line of decisions, has held that the violation of this statute may be set up as a defence to a liability growing out of the negligence of a railroad company in carrying passengers upon its road, it must have been on some other ground than that to be found in the expressions used in the statute itself. There is no such provision in it, and there is no necessary inference to be drawn from its language that it was intended to control the relations between the passenger and the carrier, or to modify the obligations of the one to the other. The language of the court in *Stanton v. Railroad Co.*, already cited, is that "because the plaintiff was engaged in the violation of law, without which he would not have received the injury sued for, he cannot obtain redress in a court of justice." This principle would seem to be as applicable to a man engaged in any other transaction forbidden by law as to that of violating the Sabbath. Whether the doctrine thus laid down is a sound one, and whether, if it be not sound as it commends itself to our judgment, we should follow it as being supported by the decisions of the supreme court of Massachusetts in numerous instances, presents in this case the only serious question for our consideration. *Hamilton v. City of Boston*, 14 Allen, 475; *Bosworth v. Swansey*, 10 Metc. 363; *Jones v. Andover*, 10 Allen, 18; *Day v. Railway Co.*, 135 Mass. 113; s. c., 15 Am. & Eng. R. R. Cas. 150; *Read v. Railroad Co.*, 140 Mass. 199. If the proposition, as established by the repeated decisions of the highest court of that State, were one which we ourselves believed to be a sound one, there would be no difficulty in agreeing with that court, and, consequently, affirming the ruling of the circuit judge in the present case. But without entering into the argument of that subject, we are bound to say that we do not feel satisfied, that upon any general principles of law by which the courts that have adopted the common-law system are governed, this is a true exposition of that law. On the contrary, in the case of *Railroad Co. v. Tow-Boat Co.*, ^{Massachusetts doctrine criticised.} 23 How. 209, this court had under consideration the same question. It arose in regard to the effect of a statute of Maryland forbidding persons "to work or do any bodily labor, or willingly suffer any of their servants to do any manner of labor on the Lord's day, works of charity or necessity excepted," and prescribing a penalty for a breach thereof. It was held by this court that where a vessel was prosecuting her voyage on Sunday, and was injured by piles

negligently left in the river, this statute making travelling on Sunday an offence and punishing it by a penalty constituted no defence to an action for damages by the vessel. A number of cases were cited sustaining that view of the subject, and the court, through Mr. Justice Grier, used this language: "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of seven thousand dollars on the libellants, by way of set-off, because their servants may have been subject to a penalty of twenty shillings each for the breach of the statute." In that case, however, there had been no decision of the courts of Maryland holding that a violation of the Sabbath would constitute a defence to the action against the company which had left the piles in the river. In this view of the matter it is not unworthy of consideration that, shortly after the injury in the present case was inflicted, the general court of Massachusetts passed a statute, to which we have already referred, declaring that travelling on the Lord's day should not "constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling."

The question then arises, how far is this court bound to follow the decisions of the Massachusetts supreme court on that subject? The Congress of the United States, in the act by which the Federal courts were organized, enacted that "the laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Rev. St. § 721; Judiciary Act, § 34, 1 U. S. St. at Large, 92. This statute has been often the subject of construction in this court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded "as rules of decision in trials at common law," is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance. The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity, or in admiralty; nor is it applicable to criminal offences against the United States (see *U. S. v. Reid*, 12 How. 361), or where the constitution, treaties, or statutes of the United States require other rules of decision. But with these, and some other exceptions which will be referred to presently, it must be admitted that it does provide that the laws of the several States

How far federal court is bound to follow Mass. court.

shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law. It has been held by this court that the decisions of the highest court of the State in regard to the validity or meaning of the constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In *Leffingwell v. Warren*, 2 Black, 599, this court said, in regard to the statutes of limitations of a State: "The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as a text." In the case of *Luther v. Borden*, 7 How. 40, Chief Justice Taney said: "The point then raised here has been already decided by the courts of Rhode Island. The question relates altogether to the constitution and laws of that State; and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State." See also *Post v. Supervisors*, 105 U. S. 667. It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts. The principle also applies to the rules of evidence. In *Ex parte Fisk*, 113 U. S. 720, the court said: "It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts." See also *Wilcox v. Hunt*, 13 Pet. 378; *Ryan v. Bindley*, 1 Wall. 66. There are undoubtedly exceptions to the principle that the decisions of the State courts, as to what are the laws of that State, are in all cases binding upon the Federal courts. The case of *Swift v. Tyson*, 16 Pet. 1, which has been often followed, established the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the State court, it was not bound to follow the latter. There is, therefore, a large field of jurisprudence left in which the question of how far the decisions of State courts constitute the law of those States is an embarrassing one. There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages,

customs, and common law. *Wheaton v. Peters*, 8 Pet. 591; *Pennsylvania v. Bridge Co.*, 13 How. 518. When, therefore, in an ordinary trial in an action at law we speak of the common law we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the State courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises. It may be said generally that wherever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess v. Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State.

We are of opinion that the adjudications of the supreme court of Massachusetts, holding that a person engaged in travel on the Sabbath day, contrary to the statute of the State, being thus in the act of violating a criminal law of the State, shall not recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish this principle as a local law of that State, declaring, as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject.

FIELD and HARLAN, JJ., dissented.

Injuries to Passengers Travelling on Sunday.—See note to *Johnson v. Missouri Pac. R. Co.*, 23 Am. & Eng. R.R. Cas. 434; *McDonough v. Metropolitan R. Co.*, 137 Mass. 354; *Day v. Highland St. R. Co.*, 15 Ib. 150; *Commonwealth v. Louisville, etc., R. Co.*, 6 Ib. 216; *Knowlton v. Milwaukee City R. Co.*, 16 Ib. 330.

GRAHAM

v.

BURLINGTON, CEDAR RAPIDS AND NORTHERN R. CO.

(Minnesota Supreme Court, July 3, 1888.)

Passenger—Personal Injuries—Subsequent Sickness—Instructions.—In an action against a railroad company to recover damages for personal injuries sustained by plaintiff while a passenger, and caused by the train colliding with another train belonging to the same company, if there is evidence that the plaintiff received injuries which would entitle him to a recovery, and which, he claimed, caused subsequent sickness, it is error for the court to instruct the jury in such terms that they must infer that plaintiff could not recover unless the sickness which came on two or three days after it was caused by it.

Same—Collision—Presumption of Negligence—Burden of Proof.—Proof of the collision when a passenger sues for injuries caused by it imposes on the company the burden of proving that it did not occur by reason of any failure to exercise the care and diligence required of carriers of passengers.

APPEAL from District Court, Freeborn County.

Action by John Graham against the Burlington, Cedar Rapids & Northern R. Co. to recover damages for personal injuries. Plaintiff appeals from a judgment for the defendant.

Wilson & Bowers for appellant.

Lovely & Morgan, John Whytock, and S. K. Tracy for respondent.

GILFILLAN, C.J.—This was an action for injuries received by plaintiff while a passenger on one of defendant's trains, caused by the train coming in collision with another train of defendant. The allegations in the complaint in respect to the injuries to plaintiff were such as Facts. would justify a recovery (if the evidence would justify it) for injuries that were apparent immediately upon the happening of the collision, and injuries not then apparent, but which were subsequently disclosed. On the trial, the evidence indicated that the injuries apparent at once were slight; plaintiff being, as he testified, knocked down, his head knocked against a board, and his hip struck, as he thought, by the tender, but he did not appear to have realized, at the time, that he was hurt so as to cause him inconvenience, for he walked a considerable distance, and then took a long ride in a carriage, at

the end of which he found himself very stiff and sore. Though those injuries were slight, they would have justified a recovery for something more than merely nominal damages. Two or three days after the collision he was taken, and continued for some thirteen weeks, seriously ill. He claimed at the trial, and gave evidence tending to prove, that this illness was an effect of the shock and bruises caused by the collision, and that the permanent consequences to his health are very serious. Defendant denied this; claiming that the illness was caused by plaintiff having taken a cold, and upon that was the chief stress of the contention.

At the request of the defendant the court gave to the jury three instructions, substantially alike; one of them being in these words: "Before he (plaintiff) can recover he must satisfy you that his sickness and alleged disabilities resulted from defendant's negligence, and not from any other source; and if he has failed to show that his injuries and sickness resulted from the collision, and not from any other source, he cannot recover." And another: "If you believe that he contracted a cold, or suffered exposure, which resulted in his sickness after he returned home, and caused the present injuries, if any, of which he now complains, he cannot recover in this action, and your verdict will be for the defendant." These instructions leave entirely out of account the evidence as to plaintiff's being knocked down, his head knocked against a board, and his hip being struck by the tender. They are so clear and explicit that the jury must have understood from them that plaintiff could not recover unless he had proved that the sickness, coming upon him two or three days after the collision, was caused by it. As we have stated, he might, on the evidence, be entitled to actual damages, with the matter of his illness left out of account. For the error in these instructions there must be a new trial. This is to be regretted, because it is apparent that they were given through inadvertence, caused by the evidence being so largely devoted to the matter of plaintiff's illness.

There was another exception to the charge, which we will but briefly notice. The court, in its charge as to the degree of care required of defendant, stated: "They are to use all reasonable care and diligence to prevent a collision." This was repeated, in effect, several times; the court in each instance using the terms "reasonable care." Plaintiff claims that this is not equivalent to the "utmost human care and foresight," which the law requires of common carriers of passengers. Defendant insists that reasonable care is that degree of care which is required of a party under the circumstances of the particular

Subsequent
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Degree of care
—Burden of
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case, and that, therefore, the rule stated by the court was right. This may be so, but then it would not give the jury much information as to the degree of care required of defendant. We are inclined to think it was not error, and that plaintiff's proper course was to request a charge embodying a definition of the degree of care imposed upon a common carrier of passengers. But, really, though it may not be strictly necessary for us to decide it, and the parties and court below seem to have considered that defendant's negligence was, on the evidence, a question which the jury could decide either way, we do not see that the evidence left any question upon it. Two of defendant's trains or engines, running on the same track in opposite directions, at a high rate of speed, came into collision. Ordinarily, such a thing would not happen without mismanagement or want of care on the part of some officer or servant of the defendant. *Prima facie*, such a thing can occur only through some negligence on the part of the railroad company. Proof of the collision, when a passenger sues for injuries caused by it, imposes on the company the burden of proving that it did not occur by reason of any failure to exercise the care and diligence required of carriers. We do not see in the settled case any evidence tending to prove that. Order reversed.

Presumption of Negligence in Case of Collision.—See *Smith v. St. Paul City R. Co.*, 16 Am. & Eng. R. R. Cas. 310; *Pittsburg, etc., R. Co. v. Spencer*, 21 Ib. 478.

PATTEE

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Dakota Supreme Court, May 23, 1888.*)

Passenger—Personal Injuries—Defective Track—Evidence.—In an action by a passenger against a railroad company to recover for personal injuries sustained by plaintiff through the derailment of the train which was caused by a broken rail, evidence that the track, not only at the spot where the accident occurred, but also at other places in the neighborhood, was defective, and that the land over which the track passed was low and wet, is inadmissible.

Same—Instruction—Weight of Evidence.—In such action, instructions that "experience proves that when a track and machinery are in perfect condition and prudently operated, the train will keep upon the track, and run thereon with entire safety to those in the cars," and that "whenever a car

leaves the track and goes down an embankment, as this car did, it proves that either the track or machinery or some portion thereof is not in proper condition, or that the machinery is not properly operated," are erroneous, as affirming that the happening of the accident is conclusive, instead of *prima facie* proof of negligence.

APPEAL from District Court, Brule County.

Action by Sarah Pattee against the Chicago, Milwaukee & St. Paul R. Co. to recover damages for personal injuries. The defendant appeals from a judgment for the plaintiff. The opinion states the case.

Burton Hanson for appellant.

J. M. Long for respondent.

McCONNELL, J.—This is one of those actions which the growing magnitude of railway building and railway travel has rendered very common in all courts of general jurisdiction throughout the United States. The plaintiff, while a passenger upon one of appellant's trains, received personal injuries, through the derailment of the coach in which she was riding, an accident resulting from a broken rail. This action is for damages for such injuries; and the substantial issue between the parties upon the trial, briefly stated in general language, was this. Did the plaintiff's injuries result from appellant's negligence? The jury found for the plaintiff a verdict for \$3000. Judgment for this amount was entered after motion for a new trial overruled.

Upon the trial, after the testimony had been all given, appellant's counsel requested the trial court to direct the jury to find a verdict for the defendant. This request was denied, and appellant excepted. The question involved in this ruling is now pressed by appellant before us, and we shall examine its pertinency preliminary to passing upon such other questions as appellant presents and we deem material for our consideration.

The theory of law upon which appellant's counsel based such request we state in our own language, as follows: Proof of personal injury to a passenger, as such, establishes, as a presumption of law, that such injury resulted from the carrier's negligence. The effect of this presumption is to cast upon the carrier defendant the burden of proving that the injury complained of did not result through his negligence. If thereupon he introduces competent evidence tending to show that his track, vehicle, and motive power were, at the time of the accident, up to the high standard of condition required for the transportation of human beings; were in charge of com-

Presumption
of negligence
in case of in-
jury to passen-
ger.

petent servants, then and there using due care in and about the management of the same; and if such evidence in that behalf remain uncontradicted and unconflicting,—its weight and effect are for the court, and not for the jury, to determine. And if, furthermore, such evidence be to the court clear and satisfactory against the presumption of law that there was negligence, there is no case to go to the jury, and the court should hold accordingly. This theory of the law is sustained by many respectable authorities. "The rule of law is doubtless that, where there is no conflict of testimony, where the existence of a fact is clearly proved by undisputed testimony, the court should hold that the fact is established, and it is error to leave it to the jury to find whether or not the fact exists." *Spaulding v. Railway Co.*, 33 Wis. 582, citing numerous authorities. In the case above cited, it was argued that the presumption of negligence arising on simple proof of the injury should be held to have the legal effect of conflicting testimony, so as to entitle the case to go to the jury; but it was held otherwise, and that such presumption, being a presumption of law and not of fact, simply cast upon the defendant the burden of proof under the issue as to negligence. While the theory of law, as above stated, may be unobjectionable, and seems to be in conformity with section 679 of the Code of Civil Procedure of this territory, defining, in certain cases, what shall constitute *prima facie* evidence of negligence on the part of railway corporations, the learned trial judge could not have held it applicable to the case at bar consistently with his other rulings. In his opinion, as shown by his ruling, there was competent evidence on the part of the plaintiff tending to rebut the testimony of appellant's witnesses that the condition of the track was good at the place of the accident. Unless, then, we should first decide that all such rebutting evidence was incompetent and improperly admitted, we need not pass upon the correctness of said theory, nor upon its applicability to the case at bar. It will be sufficient for us to pass upon the more immediate assignments of error. These may be broadly stated as twofold,—error in admitting evidence, and error in the charge to the jury.

The alleged errors as to admitting evidence relate to testimony offered as to condition of track at or near the place of accident, and may be considered as one. The testimony admitted, under objection, is that, where the car was derailed, and east and west of that spot along the track, the land was low and wet, with sloughs on both sides of track there; that some of the rails "along there" were loose on the ties, so that the hand could

Admission of
evidence as to
condition of
track.

be run under them (without the question as to such looseness being confined to a particular time); that the ties made an uneven surface, so that cars running over it caused the rails to go down (without question being confined to any particular time or place); that the track was not very smooth "along where this derailment was" (question as to place was in the words quoted, and not limited to any particular time); the ties were loose in some places, and the rails were all old. The condition of the track and road-bed at the time and place of the derailment was certainly material; but we think that the testimony objected to, as we have above grouped it, shows plainly that the learned trial court admitted what tended as much to show former and general negligence about track and road-bed as it did to show that particular negligence for which alone appellant would be liable in this action. That the land along this portion of the track was low and wet is not material, in any sense, so far as the other evidence shows; and the effect, if any, upon the jury of testimony in that behalf could only have been to confuse. We may suppose that plaintiff's witnesses were asked, in reference to the land being low and wet, as a reason for and to corroborate their statement of the badness of the track, although such reason does not appear except inferentially. But, as a matter of fact, land merely low and wet, provided it have, as is frequently the case, a stiff sub-soil, offers no obstacle whatever to the making of a smooth and permanent road-bed. It is evident that appellant intended the road-bed here made to be permanent, as it appears from the evidence that an embankment had been thrown up, and the track ballasted with gravel. It was therefore error to admit testimony as to such lowness and wetness, treating it as in itself a primary material fact; perhaps not such vital error as would, if standing alone, cause an appellate tribunal to reverse, yet one which, linked with the vagueness as to time and place with which condition of track was described in accompanying testimony, as above cited, may well have tended to influence the jury to appellant's prejudice.

We have already indicated that there was error in not confining testimony as to condition of track more closely to the time and place of the accident. The exact place of the broken rail and of the derailment seems to have been known to the witnesses. The language of the supreme court of Minnesota, in a recent case, seems pertinent in this connection: "The evidence, under the circumstances, should have been limited to those defects which caused, or reasonably might have conduced to producing, the defect existing at the place of casualty. . . . The only exceptions to this rule which now

occur to us are where the other defects were shown to be the result of a cause, presumptively operating at the place of casualty, or where such defects might have caused a defect which produced the injury. But there are no facts shown bringing this case within any such exception." *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. Rep. 358.

The evidence of plaintiff's witnesses as to the condition of track seems to refer to the same in both directions from the accident. No reason is attempted to be shown that would render material the condition of the track beyond the place of accident, in the direction the train was moving. It is barely possible that such reason might exist, and be found valid, if supported by appropriate evidence. An officer at West Point is said to have struck the trunnion of a cannon repeatedly with equal blows of a hammer. At the hundredth blow, or thereabouts, the trunnion was broken; and it has been philosophically remarked that not the hundredth blow, but all the blows, did the breaking. In like manner it might be argued (and possibly proved) that, within certain limits, the fact of rough track in both directions from a broken rail, by causing undue swaying of the train, caused undue strain of the rail with every passing car, thereby shortening the life of the rail, and affixing to it a fatal but undiscoverable likelihood to break every next time. However, we shall not speculate upon the hypothetical effect of what we certainly do not judicially know, nor, as at present advised, otherwise know.

That portion of the charge to the jury which we think it necessary to examine in relation to the assignments of error is as follows:

"Experience proves that when the track and machinery are in perfect condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on the cars,—the passengers on board.

"Whenever a car leaves the track and goes down an embankment, as this car did, it proves that either the track or the machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in proper condition and to operate it with necessary prudence and care, have in some manner violated their duty to the plaintiff."

Instructions—
Presumption
of negligence
in case of de-
railment.

There is error in the first of the two paragraphs quoted, in that it assumes as judicial knowledge what is at best only a disputable conclusion of fact; disputable certainly, unless we apply as the test of "perfect condition" and "prudent

operation " the misleading but otherwise " barren ideality " of pronouncing no track " perfect " and no machinery " prudently operated " except after a passage safely made. Indeed, the very use of the word " perfect " in this connection, and unexplained, is objectionable, as likely to cause the jury to think that the law exacts of railway corporations the duty of furnishing something better than a reasonably good track for the transportation of passengers,—a track, say, ideally good. That superlatives in this behalf are at least unnecessary, see *Cunningham v. Hall*, 4 Allen, 268, where the court say: " Reasonable care or skill is a relative phrase, and what this requires is always to be determined by consideration of the subject-matter to which it is applied ; " holding that " reasonable care or skill " would require of a ship-builder to use the same degree of care or skill as if he were in terms required to use the utmost possible skill. The first paragraph quoted of the charge, and that portion of the second paragraph preceding the words " and presumptively proves," affirm, taken together as they occur in the charge, propositions to the unmistakable effect that the happening of such accident is conclusive, instead of *prima facie*, proof of negligence. Should the remainder of the second paragraph, as quoted, be held to state a correct proposition of law, such would not cure this fatal error. We are not aware of any authority holding that a jury may be expected to discover a lurking contradiction, and decide correctly, between different statements of the law.

The judgment of the court below is reversed, and a new trial ordered.

All the justices concurring.

Evidence Admissible as to Condition of Track in Case of Accident.—See *Sidekum v. Wabash, etc., R. Co.*, 30 Am. & Eng. R. R. Cas., 640, note, 644; *Vicksburg, etc., R. Co. v. Putnam*, 27 Ib. 291, note, 299.

Presumption of Negligence in Case of Derailment.—See *Central R. Co. v. Sanders*, 27 Am. & Eng. R. R. Cas. 300; *Vicksburg, etc., R. Co. v. Putnam*, 27 Ib. 291; *Hepsley v. Kansas City, etc., R. Co.*, 27 Ib. 287; *Coudy v. St. Louis, etc., R. Co.*, 27 Ib. 291; *Philadelphia, etc., R. Co. v. Anderson*, 6 Ib. 407; note to *St. Joseph, etc., R. Co. v. Wheeler*, 26 Ib. 179; *New York, etc., R. Co. v. Seybolt*, 18 Ib. 162; *Little Rock, etc., R. Co. v. Miles*, 13 Ib. 10; *George v. St. Louis, etc., R. Co.*, 1 Ib. 294; *Pittsburgh, etc., R. Co. v. William*, 3 Ib. 457; *Cleveland, etc., R. Co. v. Newell*, 3 Ib. 483; *Louisville, etc., R. Co. v. Ritter*, 28 Ib. 167.

PERSHING, Adm'r,

v.

CHICAGO, BURLINGTON AND QUINCY R. Co.

(*Iowa Supreme Court, March 25, 1887.*)

Passenger—Wrongful Killing—Burden of Proof.—In an action to recover damages for the death of a passenger caused by the train being derailed and precipitated through a bridge, if the plaintiff has introduced evidence sufficient to raise a presumption of negligence on the part of the company, the burden of proving that the accident was not caused by any negligence or want of skill rests with the defendant, but it need not prove that nothing about its entire track was defective, but only that, as to the matters which the circumstances indicated were the cause of the accident and injury it had exercised due care.

Same—Duty of Carrier—Degree of Care.—A carrier of passengers in the conduct and management of his business, and as to all the appliances made use of in the business, is bound to exercise the highest degree of care and diligence for the convenience and safety of his passengers, and is held liable for the slightest neglect.

Same—Selection of Materials.—A railway company, employed in transporting passengers, exercises a sufficient degree of care in the selection of the plans and materials for the construction of its road and appliances, if it select such plans and materials as are in use and have been found sufficient by the best and most skilfully conducted roads of the country.

Same—Construction of Bridges.—In constructing and maintaining its bridges, a railway company is bound to take into account the fact that accidents may occur in the operation of its road, and to construct its bridges with reference thereto; and it is held to a very high degree of care in that respect.

APPEAL from Circuit Court, Polk County.

Action to recover damages for the death of plaintiff's intestate. The deceased was a passenger in one of defendant's trains, and received the injuries which caused her death, in an accident which happened to the train, some distance before reaching a bridge over a ravine, the train was derailed by a broken rail. On reaching the bridge the wheels on one side passed outside the guard rail, and the bridge gave way. The car in which the deceased was travelling was precipitated to the bottom of the ravine, and she was fatally injured. At the trial the jury brought in a verdict for the defendant, and the plaintiff appeals.

Parsons, Perry & Sherman for appellant.

J. W. Blythe, H. H. Trimble, and Runnells & Walker for appellee.

REED, J.—It is alleged in the petition that the injury was caused by the negligence of the defendant, and that its negligence consisted (1) in the manner in which its track and bridge was constructed and maintained, the latter
 Facts. being insufficient; and (2) in the manner in which the train was being run at the time of the accident. The evidence is not contained in the abstract, but it is recited in the “bill of exceptions” that plaintiff introduced evidence tending to prove the occurrence of the accident and injury, and that the deceased was not guilty of any contributory negligence, and that the accident was caused by the negligent manner in which the track and bridge were constructed and maintained, and the negligent manner in which the train was being run at the time, and by the insufficiency of the bridge, and that he then rested his cause; that the defendant thereupon introduced evidence tending to prove that its road, and said bridge and its rolling stock, and its servants and agents, were in all respects such as were accepted by, and were in general use, and found to be sufficient and approved by, the best and most skilfully managed railroads of the country, doing a like business under like circumstances with it; and the selection of its materials, the plan and construction of its roadway, track, bridges, and rolling stock, and the selection of its employees, servants, and agents, and the inspection and repairs of its road and machinery, and appliances connected with the operation of the road, were such as the best, most carefully, prudently, and skilfully managed railroads in the country exercise and require, doing a like business, and under like circumstances; and that the bridge went down, and the car in which the intestate was riding was thrown into the ravine, by reason of the derailment of the train at a point 378 feet from the bridge; that the ties, rails, and fastenings, and the ballast thereunder at that point, and between there and the bridge, were in all respects such as had been found sufficient by the most skilfully and prudently managed railroads of the country, doing a like business, under similar circumstances; that the same were, from time to time, and as frequently as by other railroads, inspected in the usual way of inspecting such appliances, by the most carefully and prudently managed railroads of the country, by an employee of competent skill and experience in such matters; and that the rails and joint fastenings appeared sound, and all their supports sound and secure; and that there were no flaws or defects visible that could have been discovered by such inspection; and that the shock or blow which caused the bridge to fall was of unusual and extraordinary violence, and that the bridge would not have otherwise have gone down, and that

the guard-rails on the bridge were such as were usually and customarily used by the most skilfully managed railroads of the country, under like circumstances.

In rebuttal, plaintiff introduced evidence tending to prove that the bridge was not sufficient, either in plan or construction; that the guard-rails were not of sufficient size, and were not properly placed or fastened; that the joint fastenings at the point at which the derailment occurred were insufficient, and were broken prior to the occurrence of the derailment; and that the brake might have been discovered by a careful and proper inspection, before the passage of the train.

The errors assigned all relate to the instructions given by the court to the jury:

1. In the seventh, eighth, and thirteenth instructions the jury were told, in effect, that the burden was on plaintiff to show that the injury was caused by the negligence of the defendant; but that, if he had established that the accident was attended by circumstances showing that it was caused by the defective construction of the roadway, bridge, track, or the fastenings of the rail at the point where the derailment occurred, or its train or cars, or by the management or running of the train, this would raise a presumption of negligence, and would cast upon defendant the burden of proving that it was not caused by any negligence or want of skill on its part, either in the construction or maintenance of its roadway, track or bridge, or in the management of the train, or the condition of the cars, but that this presumption extended only to those portions of the track, machinery, or bridge which the circumstances of the accident were possibly defective, and it was not required to prove that nothing about its entire train and roadway were defective; and that the burden cast upon it by proof of the happening of the accident, and the attending circumstances, only required it to show that, as to the matters which the circumstances indicated were the cause of the accident and injury, it had exercised due care; and that it was not required to satisfactorily explain the reason of the breaking of the rail, and the derailment of the train, and the breaking down of the bridge, but was only required to prove that these things did not occur through any negligence on its part.

Presumption
of negligence
in case of acci-
dent—Instruc-
tions.

The point urged by counsel for appellant is that the instructions are erroneous, in that they limit the burden imposed upon defendant by the evidence of the occurrence of the accident, and the attendant circumstances, to prove merely that it had not been negligent in respect to those matters which the circumstances indicated were the cause of the

injury. Their position is that the presumption which arises upon proof of the happening of the accident is not a mere presumption of negligence as to some specific matter, but is a presumption of general negligence on the part of the carrier; or, in other words, they insist that the presumption is that he is legally liable for the injury, and that this presumption can be overcome only by proof that it was caused by inevitable accident, and that it follows necessarily from this that he must account for the accident, and show that he was free from all negligence in the matter.

The rule which casts the burden of proof on the carrier is a rule of evidence having its foundation in consideration of policy. It prescribes the *quantum* of proof which the passenger is required to make in making out his case originally, and he is entitled to recover on that proof, unless the carrier can overcome the presumption which arises under the rule from the facts proven. *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Thomp. Carr.* 209.

The rule undoubtedly requires the carrier to prove his own freedom from negligence as to the cause of the injury. But that, it appears to us, is the doctrine of the instructions. The immediate cause of the injury to plaintiff's intestate was the breaking down of the bridge, and the consequent precipitation of the car into the ravine, and this was occasioned by the blow or concussion by the derailed train. In seeking for the cause of the injury, then, it became necessary to inquire as to the cause by the derailment of the train, and whether there was any defect in the track or roadway or bridge, or in the cars or machinery of the train, or any negligence in the management of it at the time; for the circumstances indicated unmistakably that the cause of the accident was to be found in some of these matters. They constituted the subject of the inquiry as to this branch of the case, and defendant very properly confined its proof, as to the diligence and care it had exercised, to that subject.

As there was nothing to indicate that any other matter could have contributed to the accident, it could not be required to show that it had been careful as to other matters. Such evidence would clearly have been immaterial, and the holding of the instructions is that it was not required to go beyond the cause of the injury in making proof of care and diligence. The holding that it was not required to give a satisfactory explanation of the cause of the breaking of the rail and bridge is supported by *Tuttle v. Chicago, R. I. & P. R. Co.*, 48 Iowa, 236.

2. The following instructions were given by the circuit court: "It is a duty of a railway company, employed in trans-

porting passengers, to do all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance, and the practical operation of the road, in providing safe coaches, machinery, tracks, rails, angle-bars, or splices, bridges, and roadway, and in the conduct and management of its trains for the safety of its passengers, and to keep the same in good repair. The utmost degree of care which the human mind is capable of inventing or producing is not required, but the highest degree of care, vigilance, and foresight that is reasonably practicable in the conduct and management of its road and business is required. . . . Common carriers of passengers are held to the very highest degree of care and prudence that human care, vigilance, and foresight could reasonably do, which is consistent with the practical operation of their road, and the transaction of their business; yet they are not absolute insurers of the safety of their passengers; and if you find that the defendant exercised all reasonably practical care, diligence, and skill in the construction, preservation, inspection, and repairs of its road-bed, bridges, track, rails, angle-bars, or splices, in the management and operation of its road, and of the train, at the time of the accident alleged and shown to have occurred, and that the accident could not have been prevented by the use of the utmost practicable care, diligence, and skill consistent with the practical operation of its road, and the transaction of its business, then plaintiff cannot recover in this action."

Duty of carrier of passengers—Degree of care—Instructions.

The rule which has been uniformly recognized and enforced in this State is that the carrier, in the conduct and management of his business, and as to all the appliances made use of in the business, is bound to exercise the highest degree of care and diligence for the convenience and safety of his passengers, and he is held liable for the slightest neglect. *Frink v. Coe*, 4 G. Greene, 555; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Bonce v. Dubuque St. Ry. Co.*, 53 Iowa, 278; *Kellow v. Central Iowa R. Co.*, 68 Iowa, 470. It is insisted that the instructions are in conflict with this rule. The position of counsel is that, by the use of the words reasonable, reasonably, practicable, and reasonably practical, in the instructions, the care for the safety of the passenger required of the carrier is lowered, and he is required to exercise reasonable or ordinary care only. It will be observed, however, that these words, as they are used in the instructions, while they to some extent limit the degree of care required of the carrier, have special reference to the practical operation of the railroad, and the conduct of the business. When the instructions are scrutinized, it will be found that

the doctrine announced by them is that defendant was bound to exercise the highest degree of care and diligence which was reasonably consistent with the practical operation of its railroad, and the conducting of its business; and this is right. It is doubtless true that precautions could be used in the construction and operation of railroads that would prevent many of the accidents which occur as they are constructed and operated.

It sometimes happens that a derailed train is precipitated from a high embankment, and the lives of its passengers endangered or destroyed. Accidents of that character could be avoided by constructing all railroad embankments of such width that a derailed train or car would come to a stop before reaching the declivity. But this would add immensely to the cost of constructing such improvements, and, if required, would in many cases prevent their construction entirely. If passenger trains were run at the rate of 10 miles per hour, instead of from 25 to 40 miles, it is probable that all danger of derailment would be avoided. But railroad companies could not reasonably be required to adopt that rate of speed. Their roads are constructed with a view to rapid transit, and the travelling public would not tolerate the running of trains at that low speed. When it is said that they are held to the highest degree of care and diligence for the safety of their passengers, it is not meant that they are required to use every possible precaution, for that, in many instances, would defeat the very objects of their employment. There are certain dangers that are necessarily incident to that mode of travel, and these the passenger assumes when he elects to adopt it. But all that is meant is that they should use the highest degree of care, that is reasonably consistent with the practical conduct of the business, and that is the doctrine of the instructions, and it is abundantly sustained by the authorities. *Indianapolis R. Co. v. Horst*, 93 U. S. 291; *Dunn v. Grand Trunk R.*, 58 Me. 187; *Hegeman v. Western R.*, 13 N. Y. 9; *Kansas Pac. R. v. Miller*, 3 Colo. 442; *Wood, R.*, 1047, 1054.

3. The eleventh, twelfth, and fourteenth instructions given by the court are as follows:

“The degree of care required of defendant is the selection of its materials, the plan and construction of its roadway, track, bridges, and rolling stock, in the selection of its employees, servants, and agents, and in the inspection and repairs of its road, and the machinery and appliances connected with the operation of the same, is such as the best, most carefully, prudently, and skilfully managed, railroads of the country

Selection of
materials in
construction
of road and
appliances.

exercise and require, doing a like business, and under like circumstances.

“The high degree of care hereinbefore referred to, and required of defendant, embraces its roadway, track, bridges, and rolling stock, and the selection of its employes, servants, and agents. In supplying materials for and in constructing its roadway, track, bridges, and rolling stock, it was required to exercise that high degree of care to see that materials used were amply sufficient, and of such quality, size, pattern, as were accepted by and in general use and found to be sufficient, and approved by the best and most skilfully managed railroads of the country, doing a like business with defendant. In the selection of train-men, and in the management of its train, it was bound to exercise that high degree of care, and to provide men of sufficient experience, skill, and prudence to run such train safely, as far as was practicable; and it was bound also, in like manner, to see that, in the actual management of the train at the time of the accident, the train-men exercised a like degree of care and skill in managing and running the train safely in all respects, so as to avoid injury to the passengers. If defendant failed in any of these respects, and such failure was the cause of the injury complained of, it was negligent, and is liable.

“If you find that the rails which were broken were made by a manufacturer of good repute, were made upon the approved method of manufacturing rails, were properly tested by the proper known and usually applied tests then in practical use, and had been on the track for several years, and had successfully stood the strain of numerous passing trains without in any manner affecting their quality or strength, so far as could be seen by proper examination, carefully and skilfully made; if, at the time of the accident, they were placed and lying securely on sound ties, with good angle-bars or splices at the ends, with sufficient ballast under the ties, with all their connections and support well adjusted; if they had been subjected to a daily inspection in the most approved and customary way of inspecting such appliances, by the most careful and best managed railroads in the country, by some servant of competent skill and experience in such matters, and said rails appeared then sound, and all these connections and supports sound and secure; and if there were no flaws or defects visible, or that could have been discovered by such approved and customary inspection, made in the manner hereinbefore explained,—then the defendant was not negligent with reference to said rails.”

Some of the members of the court think that the eleventh instruction is erroneous, but we unite in the conclusion that,

if it should be conceded to be erroneous, the plaintiff could not have been prejudiced by it. The doctrine of the instruction is that the degree of care required of defendant in the selection of plans and materials for its roadway, bridges, and appliances was such as was exercised by the best and most skilfully and carefully managed railroads in the country, under like circumstances. The objection urged against it is that it treats the practices of the class of railroads named, in the matters in question, as affording an absolute standard of duty as to those matters, thus, in effect, making the very practices which are called in question the law of the case. We admit the force of the objection. But the twelfth instruction was drawn with special reference to the facts of the case, and in it the jury were told, in effect, that defendant was bound, not only to select such plans and material for the construction of its road and appliances as were in use by the best and most skilfully conducted roads of the country, but that such materials and plans must have been found sufficient by the other roads. This is clearly right. When a plan of construction, and the materials made use of, have been found by actual experience to be sufficient and safe, other roads, whose business is to be carried on under like circumstances, are warranted in adopting them. To hold otherwise would be to hold that railroad companies, in the construction and operation of their roads, could not avail themselves of the experience of others, and that the construction and operation of every road must, to a great extent, be a matter of experiment. With this rule distinctly laid down as applicable to the facts of the case, we think the jury could not have been misled by the eleventh instruction, conceding that it is erroneous. This concession, however, must be understood as being made only for the purposes of the argument, for a majority of the court are of the opinion that the instruction is not erroneous. We think, also, that the fourteenth instruction is correct.

4. In another instruction the jury were told that defendant "was not required to so construct its bridge that it would resist an unusual and extraordinary shock of a derailed train, running at regular speed, and striking it with great force." After the jury had been considering the case for some time they were again brought into court, and the court gave them further instructions on that subject, which very materially modified the one quoted above. In the additional instructions they were told, in effect, that defendant was required to take into account, in constructing and maintaining its bridges, the fact that accidents might occur in the operation of its road, and to construct its bridges with reference thereto ;

Construction
of Bridges.

and that it was held to a very high degree of care in that respect. As thus modified, the instruction quoted affords plaintiff no just ground of complaint.

We have found no ground in the record upon which we think we ought to disturb the judgment, and it will be affirmed.

Burden of Proof Cast upon Carrier in Case of Accident.—See generally, *Pattee v. Chicago, etc., R. Co.*, *ante*; *Graham v. Burlington, etc., R. Co.*, *ante*; *Louisville, etc., R. Co. v. Ritter*, 28 Am. & Eng. R. R. Cas., 167; *Louisville, etc., R. Co. v. Thompson*, 27 Ib., 88; *Savannah, etc., R. Co. v. Stewart*, 25 Ib. 334 *n.*; *Central R. Co. v. Roach*, 25 Ib. 334 *n.*; *Cleveland, etc., R. Co. v. Newell*, and note, 23 Ib., 492, 501.

STEVENS

v.

CENTRAL RAILROAD AND BANKING CO.

(*Georgia Supreme Court, March 3, 1888.*)

Passenger—Personal Injuries—Evidence—Competency.—In an action to recover damages for personal injuries, evidence that plaintiff had made an assignation with a woman for the next day after he was injured, and that he walked four or five miles to meet her, is admissible, not only to throw light upon the particular injury complained of, but also to show plaintiff's general physical condition.

ERROR to Superior Court, Macon County.

Action to recover damages for personal injuries. Plaintiff appeals from a judgment for the defendant. The opinion states the case.

Frank A. Arnold, W. H. Fish, and George T. Fry, for plaintiff in error.

Lyon & Estes and J. W. Haygood, for defendant in error.

SIMMONS, J.—George C. Stevens sued the Central Railroad & Banking Co. for \$10,000 damages for personal injuries alleged to have been sustained by him by reason of the defendant's negligence. His declaration alleged that on the night of the 27th of May, 1886, he purchased from the defendant's agent at the ticket office at Marshallville a ticket entitling him to passage over the defendant's road, and that, while walking in the dark across the grounds

Facts.

of the defendant on his way to meet the train at the usual point of embarking and to take passage thereon, he unexpectedly came to an abrupt step or break in the ground which caused him to stumble, and in attempting to recover himself he stumbled upon and fell over a bank of sand, thereby sustaining injuries to his wrist and spine, and other serious personal hurt. He alleged that these injuries were caused without fault or negligence on his part, but were due to the negligence of the defendant in failing to keep its grounds in safe condition and properly lighted at night for the protection of passengers. The jury, upon the trial of the case, found in favor of the defendant. The plaintiff moved for a new trial, which was refused, and he thereupon excepted. The grounds of the motion for a new trial are, in substance, as follows: The first, second, and third grounds are the usual ones, that the verdict is contrary to law and to the evidence. The

Grounds of motion for new trial. fourth ground is that the court, after stating what the plaintiff claimed in his declaration, failed to charge the law on the given state of facts; whether plaintiff's theory was well or ill-founded in law; whether or not it was the duty of the defendant to provide at night suitable lights in and about its station grounds where passengers usually and ordinarily went, to warn them; and failed to charge as to the duty of railroad companies to provide safe and unobstructed passage about their station grounds used by passengers in going from the ticket office to the usual place of boarding cars. The fifth ground is that the court failed to charge as requested by plaintiff's counsel, "that a railroad company is bound to keep in safe condition stations and station grounds where passengers are expressly or impliedly invited to go, and to use extraordinary care for the safety of passengers using stations and station grounds;" and charged in lieu thereof (and so far as he charged at all on the duty of railroads to passengers) that "there are certain principles of law regulating the liability of railroad companies to which the court invites your attention. A railroad company is bound to extraordinary diligence on behalf of itself and its agents to protect the lives and persons of its passengers, but it is not liable to injuries of passengers after having used such diligence. Diligence is of two kinds,—ordinary diligence, which is that care which every prudent man takes of his own property of a similar nature (absence of such diligence is termed ordinary neglect); and extraordinary diligence, which is that extreme care and caution which every prudent and thoughtful person uses in securing and preserving their property (absence of such diligence is termed slight neglect). You perceive the distinction between ordinary and extraordinary

diligence. When a person has purchased his ticket and arrived at the point of departure, though he has not entered the cars, he is a passenger, and while waiting for the train to set out he is, as to all the duties of the company directly involving his safety, entitled to extraordinary diligence; as to all duties involving merely his convenience and accommodation, to ordinary diligence. The company is charged, under the state of facts just supposed, with extraordinary diligence so far as it involves the safety of the passenger; so far as it merely involves the convenience and accommodation of the passenger, it is only bound to ordinary diligence. That is the distinction to be borne in mind. If a railroad company has used all proper diligence in providing a suitable place for passengers to enter the cars, and has given full and fair opportunity to enter the cars at that place, a passenger who has declined to enter until the last moment is entitled only to usual and ordinary diligence in keeping him from being left. The rule of extraordinary diligence applies only to receiving, keeping, carrying, and discharging of passengers, and to their safety. These are the rules which the law has provided upon this subject. These are the rules which the court gives you as applicable to that branch of the case." The sixth ground is because the court erred in charging the jury that "if a railroad company has used all proper diligence in providing a suitable place for passengers to enter the cars, and has given full and fair opportunity to enter the cars at that place, a passenger who has declined to enter until the last moment is entitled only to usual and ordinary diligence in keeping him from being left." The seventh ground of the motion is that the court did not give the jury any rule for reconciling the testimony of witnesses, nor for determining their credibility in case of conflict, although the testimony of the plaintiff conflicted with that of other witnesses set out in this ground of the motion. The eighth ground is that the court failed to charge the jury on the subject of impeaching testimony, although Bryan's interrogatories, sued out by the plaintiff, were introduced by the plaintiff solely to contradict and impeach the oral testimony of Bryan as a witness for the defendant. The ninth ground is that the court refused to rule out Bryan's testimony as a witness for the defendant on the subject of the plaintiff's exchanging photographs with a negro girl, Julia, and conversations and engagements with her; plaintiff's counsel having moved to rule out the same on the ground that it was irrelevant and calculated to mislead the jury, and prejudice the plaintiff in the minds of the jury. The tenth ground is that the court, after admitting, over objection of the plaintiff, the testimony of the witness Bryan

as to plaintiff's exchanging photographs with the negro girl, Julia, and conversations and engagements with her, failed in his charge to the jury to restrict the effect of the evidence to the matter for which he ruled it irrelevant, to wit, the extent of plaintiff's spinal injuries.

1. We have carefully read the evidence sent up in this record, and think that it fully authorizes the conclusion reached by the jury in their verdict, that this railroad company was not liable for the injury sustained by the plaintiff in error. We think, therefore, that the complaint made in the first, second, and third grounds of the motion is not well founded.

2. The fourth, fifth, and sixth grounds complain of the failure of the court to charge on the points therein set out, and of the charge of the court as given. We have read the entire charge as set out in the record, and find it to be fair and impartial between the plaintiff and the defendant, and that the points about which complaint is made in these grounds of the motion are fully covered in the general charge of the court.

3. The seventh ground complains that the court did not give to the jury any rule for reconciling the testimony of the witnesses, nor for determining their credibility in the case of conflict. If the testimony was conflicting and the conflict was upon material points in the case, and if counsel thought it was important that the rule upon this subject should have been given to the jury, they should have called the attention of the court thereto before the jury retired to make up their verdict. The record does not show that the court's attention was called to this matter, or that any request was made of the court to give this rule in charge. This view also disposes of the complaint made in the eighth ground, as to the failure of the court to charge on the subject of impeaching testimony. In the case of *White v. Hand*, 76 Ga. 3, this court held that "If the court omitted to give in charge an appropriate and pertinent principle of law, the party complaining should have called his attention to the omission, and then, if he refused to give it, there would have been ground for alleging error."

4. The main ground relied on here for reversal is the error complained of in the ninth ground of the motion, viz., that the court refused to rule out Bryan's testimony on the subject of the plaintiff's exchange of photographs with the negro girl, and his conversations and engagements with her. The plaintiff, in his declaration, and in his evidence before the jury, complained that his spine was badly injured by reason of his fall in attempting to reach the railroad track; indeed, that spinal concussion or

Verdict supported by evidence.

Instructions.

Evidence as to assignment with woman.

something of that sort had been produced by the fall. We think that any evidence going to contradict this would be admissible. This evidence, which was objected to and which the plaintiff sought to have ruled out, was to the effect that the plaintiff had exchanged photographs with a negro girl on the afternoon before he was injured, and had made an assignation with her for the next day; and on the morning of the next day he walked four or five miles in the direction of where she lived. If he did make the agreement to meet this girl, and walked that distance for this purpose, it would certainly throw light upon his physical condition after the injury; and the jury might well conclude that his spine was not so badly injured as he claimed it to be. We therefore see no error in the refusal of the court to rule out this evidence. It is not only admissible to throw light upon the particular injury complained of to the spine of the plaintiff, but also upon the general physical condition of the plaintiff after he was injured. The court therefore did right in not limiting the effect of it, in his charge to the jury, as complained in the tenth ground of the motion. Being competent and legal evidence, it was admissible for all purposes, and the jury had a right to give it such weight as they saw proper to give it.

Judgment affirmed.

LOUISVILLE AND NASHVILLE R. CO.

v.

JONES.

(Alabama Supreme Court, March 1, 1888.)

Passenger—Death—Proximate Cause.—If the death of a person from pneumonia is contributed to or hastened through the negligence of a railroad company or its servants, the company is liable in damages although death would in any event have supervened.

Same—Aggravation of Disease.—Although a person had pneumonia at the time he was injured, and died of it, the injury, and not the disease, was the cause of the death, if it so impaired his strength and vital force as to render the disease incurable, when, but for the injury, it would have yielded to treatment.

Same—Previous Bad Health.—The fact that a person injured through the negligence of a railroad company would have recovered from his injuries, if he had not been in bad health at the time when the accident occurred, will not preclude a recovery if the death was not solely the result of bad health.

Same—Evidence—Sufficiency.—To authorize a recovery for the negligent killing of a person it is not necessary that it should be established beyond doubt that the death resulted from the defendant's negligence. It is sufficient if there is such preponderance of testimony as produces reasonable conviction.

APPEAL from Circuit Court, Jefferson County.

Action by Thomas F. Jones, as administrator of the estate of Rebecca Jones, deceased, against the Louisville & Nashville R. Co., for damages for the death of the plaintiff's intestate. The testimony tended to show that the plaintiff's intestate was a passenger on the defendant's road, when the coach in which she was riding was derailed, breaking one of her ribs; from which cause she contracted pneumonia, and died. The defendant introduced testimony that Mrs. Jones had incipient pneumonia when the accident occurred, and that she would probably have died from the effects of the disease although she had never met with the accident. The court instructed the jury at plaintiff's request: "That if they believed, from the evidence, that the plaintiff's intestate, Mrs. Jones, was injured through the negligence of the defendant, and that such injury caused her to take pneumonia, or aggravated the pneumonia from which she was then suffering, so that death resulted on that account, the plaintiff is entitled to recover, unless she would have died from pneumonia as an independent cause if she had not received the injury."

The defendant excepted to this charge, and requested the court to give the following charges which were refused: "(1) If the jury believe, from the evidence, that, before the accident, the plaintiff's intestate was taking or had incipient pneumonia, and if the jury further believe, from the evidence, that the plaintiff's intestate died from such pneumonia, then the presumption is that the injury she received at the time of the accident did not cause the death of the plaintiff's intestate. (2) If the jury believe, from the evidence, that, before the accident, the plaintiff's intestate was taking or had incipient pneumonia, and if the jury further believe, from the evidence, that the plaintiff's intestate died from such pneumonia, then the jury is authorized from these facts, in connection with all the other facts in the case, to infer that the injury received at the time of the accident did not cause the death of the plaintiff's intestate. (3) That if the jury believe, from the evidence, that, if the plaintiff's intestate had been in ordinary health when the accident occurred, her injury would not have produced death, and that her death was the result of bad health at the time of the injury, then plaintiff cannot recover in this action. (4) That if the jury believe, from the evidence, that the train of the defendant was thrown

from the track, not from a loose car-wheel, or from carelessness in the management of the car, train, or engine, while in motion, or from a low or sunken joint in the track, and that the train being thrown from the track, by said defect in the track, caused the injury complained of in the complaint, then they must return a verdict for the defendant. (5) If all the evidence in the case leaves it doubtful as to whether the death of the plaintiff's intestate was caused by the injury she received upon the defendant's train, or from natural causes, then the jury must find for the defendant. (6) If the jury are in doubt, after weighing all the evidence in the case, as to whether the injury received by plaintiff's intestate, while upon defendant's train, caused her death, or whether she died from natural causes, then they must find for the defendant. There was a judgment for the plaintiff from which the defendant appeals.

Hewitt, Walker & Porter for appellant.

Smith & Lowe for appellee.

STONE, C.J.—The complaint in this case contains two counts. The *gravamen* of the first is that defendant negligently permitted a wheel of the trucks, attached to the coach in which the plaintiff's intestate was being carried as a passenger, to become and remain loose, by which said coach was thrown from the track, injuring her and causing her death. The second does not specify any particular omission of duty. Its averments are that "the defendant did not use due and proper care or skill in and about the carrying of the said Rebecca Jones on the said journey, but so negligently and unskillfully conducted itself in that behalf, and in conducting, managing, and directing the coach in which said Rebecca Jones was such passenger, . . . and the engine whereby the said train was drawn upon and along the said railway, that the coach which contained the said Rebecca Jones was thrown and cast with great violence from and off the rails of the said railway," etc. There was no demurrer to either count, but issue was taken upon them. Two well-defined principles of law bear on the questions arising on the pleadings, and also must be kept in mind when we come to treat of the charges refused: First, in stating or averring matters which are, in their nature, more within the knowledge of the defendant than the plaintiff, less particularity is required; second, if injury is suffered at the hands of a common carrier, the law, in the absence of all explanation, presumes it was the result of the carrier's fault, and casts on the latter the burden of overturning the presumption, or of showing that diligence and a careful

Allegations in complaint.

Principles bearing on questions arising.

observance of duty could not have prevented the injury. Steph. Pl. 328, 329; Railroad Co. *v.* Bees, 82 Ala. 340, 2 South. Rep. 752; Leach *v.* Bush, 57 Ala. 145.

"Skill" and "care," in and about the carrying of a passenger on a railway, are not confined to the mere competency and watchfulness of the officers in charge of the train. Nor

are these qualifications the only factors which enter into the inquiry whether or not the carrier conducted itself negligently or unskillfully in the particular service. The track, locomotive machinery, or the rolling stock may be unskillfully or negligently constructed, or may be negligently permitted to remain out of repair. If a railway corporation, in either of the conditions named, carry a passenger, and he suffers injury from defective structure, or failure to make proper repairs, this is negligence or unskillful conduct on the part of the corporation, and gives a right of action. And the defect of structure, or want of repairs, being much better understood by the corporation or person operating the road than by the person who suffers the injury, it need not be averred with more particularity than is found in the second count in this case. Leach *v.* Bush, 57 Ala. 145; Railroad Co. *v.* Carloss, 77 Ala. 443; Insurance Co. *v.* Moog, 78 Ala. 284.

Lest we be misunderstood, we will repeat here what we have heretofore said. Railroads are not required to adopt every new invention. It is sufficient if they conform to such machinery and appliances as are in ordinary use by well-regulated railroad companies. Railroad Co. *v.* Allen, 78 Ala. 494; Propst *v.* Railway Co., 3 South. Rep. 764.

Another principle of law bears on some of the rulings of the circuit court. Even if Mrs. Jones had pneumonia, or incipient pneumonia, at the time she received the injury, and it could be known that she would ultimately die of that disease, this would not necessarily, and as a matter of law, relieve the railroad of all responsibility. If the injury was caused by the negligence of the railroad company, under the rules declared above, and if it contributed to and hastened her death, then the corporation would not be guiltless. Tidwell *v.* State, 70 Ala. 33; Whart. Hom. § 382. This would be so in criminal prosecutions, and must be at least equally so in a civil suit, such as this. In such case the wrong and injury are, in fact, the cause of the death. The charge given at the instance of the plaintiff is free from error.

Carrier liable for causing death of deceased person. If the plaintiff's intestate had pneumonia at the time she was injured, and died of it, it does not follow that the injury was not the real cause of her death, in this,—that it so im-

paired her strength and vital force as to render the disease incurable, when, without the injury, it would have yielded to treatment. Nor, in such case, is there any presumption that the disease alone caused her death, rather than that the disease augmented and accelerated by the injury produced the result. These were questions for testimony, for argument, and for deliberation by the jury; but no legal presumption arises, either one way or the other, out of the facts hypothesized in the first charge asked by the defendant. The circuit court did not err in refusing this charge. The second charge is faulty, because its tendency would have been to withdraw from the minds of the jury all aggravating or accelerating effect the injury might have produced. Moreover, it is in substance an argument, and well calculated to mislead. It was rightly refused.

The third charge is, to some extent, subject to the same criticism as that we have indulged in reference to the second. If the hypothesis of its second clause had been "that her death was solely the result of bad health," it would only have asserted the true doctrine in reference to the testimony before the jury.

The principles we have declared above, when considering the complaint, show that the court rightly refused to give the fourth charge.

The fifth and sixth charges raise the same question. To authorize a recovery in a civil suit, it is not necessary to establish the right beyond doubt. Such preponderance of testimony as produces reasonable conviction is ^{Sufficiency of evidence.} enough. These charges were rightfully refused.

3 Brick. Dig. 434, §§ 409-414; *Adams v. Thornton*, 78 Ala. 489; *Insurance Company v. Moog*, 81 Ala. 335; 1 South. Rep. 108. There are authorities which hold that, when testimony is in equipoise, the finding must be against the party on whom the burden of proof rests. *Lindsey v. Perry*, 1 Ala. 203; *Vandeventer v. Ford*, 60 Ala. 610; *Wilcox v. Henderson*, 64 Ala. 535. These charges do not raise that question. In *Life Ass'n v. Neville*, 72 Ala., 517, 521, is this expression: "While we fully recognize the principle that, whenever the evidence in a cause leaves a disputed fact in doubt and uncertainty, the issue must be found against the party upon whom the burden of proof rests." It was not intended in that case to declare that a mere doubt is enough to defeat a recovery in a civil suit. This disputed fact, to be within the principle declared, must not only be in doubt; it must be left in uncertainty. Certainty, in the law, has many intents, varying in degree. The concluding part of the sentence shows there was no intention to overturn or weaken the long-

recognized rule as to the measure of proof in civil suits. Its language is that "courts and juries should rather weigh than count the testimony of witnesses, and a decree or verdict should never be found by them on a mere preponderance which fails to produce a proper conviction or satisfaction in their minds." That was a chancery case, and the duty rested on the court, not on a jury, to weigh the testimony.

We find no error in the record. Affirmed.

Injury to Invalid Person—Aggravation of Disease.—See *East Line, etc., R. Co. v. Rushing, etc., R. Co., ante*, *Owens v. Kansas City, etc., R. Co.*, 33 Am. & Eng. R. R. Cas. 524, note, 530; *Louisville, etc., R. Co. v. Falvey*, 23 Ib. 522, note 536.

HURT

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(*Missouri Supreme Court, February 20, 1888.*)

Passenger—Personal Injuries—Damages—Opinion—Evidence.—In an action by a parent to recover damages for injuries which have disabled his minor child, the plaintiff cannot state his opinion of the amount he is damaged by reason of the injuries, taking into consideration the loss of his child's work until he is twenty-one, and the trouble and expense he had been at in caring for the child, and would be at in the future.

Same—Setting Down Passenger—Duty of Company.—The conductor of a train, acting as the agent of the company, in order to comply with the obligation of the carrier to a passenger, is only charged with the duty of carrying him safely to his destination, announcing the arrival of the train at the station, and giving him a reasonable opportunity to leave the cars; and it is error to instruct the jury in an action for personal injuries that the company is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them down safely thereat.

Same—Negligence Comparative.—The doctrine of "comparative negligence" has never been recognized in Missouri.

Same—Minor Child—Excessive Damages.—A verdict of \$4500 in favor of a parent as damages for loss sustained through the disabling of a child of ten years of age is excessive and will be set aside when it appears that the child's services before he came of age would not have been worth more than \$1100 at the most.

APPEAL from Circuit Court, Madison County.

Action by Samuel Hurt against the St. Louis, Iron Mountain & Southern R. Co. to recover damages for injuries to his

son, J. Henry Hurt. The defendant appeals from a judgment for the plaintiff. The case is stated in the opinion.

Bennett Pike, Wm. Carter, and H. G. Herbel for appellant.

J. E. F. Edwards, Moses Whybark, Mr. Emerson, and Cahoon & Caloon for respondent.

SHERWOOD, C.J.—Action by plaintiff for injuries received by his minor son, a boy about five years old, who was shaken from the front platform of a caboose, and run over by a car of the defendant, in consequence of the caboose being struck by the train from which it was detached, backing suddenly. The result of the accident was that one of the boy's legs had to be amputated just below the knee, as well as the toes of the other foot. The plaintiff, his wife, and four children, aged, respectively, one, five, seven, and ten years, took passage in the caboose of the defendant from Knob Lick to Fredericktown, their point of destination. When that point was reached, the conductor announced the station, the cars stopped, and other passengers got out, and while the plaintiff was on the front platform, and in the act of getting off with his wife and children, the collision occurred, with the consequences above stated. It seems that this collision or jar of the cars took place as the result of the trainmen making what is called a "running switch," and this was made after a signal had been given to "back up." As is usual in such cases, there was great conflict in the testimony; that of the plaintiff showing that not sufficient time was given after the train stopped to permit himself and family to alight, and that their employees were guilty of carelessness in backing the train; that of the defendant showing the exercise of care, and the giving of ample time for alighting; the different witnesses on either side fixing at from one half minute to some four or five minutes; that the caboose remained at a stand-still. The result of the trial was a verdict for the plaintiff for \$4500.

As the evidence was conflicting, the only points for discussion will be in reference to the admissibility of the testimony, the instructions, and the amount of the verdict. Of these in their order. While the plaintiff was testifying, his counsel drew his attention to the amount of his damage in the following way: "Now, then, having stated his incapacity for work, tell the jury, as near as you can, what, considering first the loss of his work until his twenty-first year of age, and the trouble and expense you have been at in caring for the child, and in the caring for him in the future, the amount you are damaged by reason of the injuries. State, if you can, how much you think you are damaged." Objection was made by

the defendant's counsel to the witness making such statement, as requested, upon the ground that such estimate of the witness would be merely speculative, and not the proper measure of damages; but the objection was overruled, and the witness answered: "Well, from the loss of the child's work, and what I have lost myself, I claim damages, \$5000."

1. The objection was well taken, and should have prevailed. A witness not testifying as an expert, testifying merely as to

Opinion of
witness, not
expert, as to
amount of
damages not
admissible.

matters with which the jury may well be supposed to be as conversant as himself, and as capable of drawing a correct conclusion, is not allowed to give an opinion. 1 Phil. Ev. 781 (Cow. & H. Notes); Ramadge v. Ryan, 9 Bing. 335. The books are full of illustrations of this doctrine.

Blair v. Railroad, 20 Wis. 262, is a case directly in point. A member of a mercantile firm had been injured by the negligence of a railroad company; the injury causing his enforced absence from the firm. It was ruled that his partner, testifying as a witness, could not be allowed to state his opinion as to the amount of damage the firm had sustained by reason of that absence. To the same point is Lincoln v. Railroad, 23 Wend. 424. Wherever the testimony sought to be elicited amounts to but matters of opinion as to the future, not of a present fact, it is inadmissible. Burt v. Wigglesworth, 117 Mass. 302. Here, the testimony drawn out of the witness as to the amount of his damage was merely speculative in its character, and the response that he made to his counsel was but a substitution of the judgment of the witness for the judgment of the jury, and virtually put him in their place. If the opinion sought is based on no evidence, it should be rejected; and, if properly founded upon evidence, that evidence ought to be laid before the jury; the law presuming that they are equally as capable to draw therefrom the correct inferences. Best, Ev. (Chamberlayne), 497. A result similar to the one here announced, as to an opinion of a non-expert witness respecting damages, has been reached in Belch v. Railroad, 18 Mo. App. 80.

2. Now as to the instructions. The second one for the plaintiff was in this language: "No. 2. The court instructs the jury that defendant, as a railroad company, is responsible to passengers for the careless or negligent acts of its agents and servants employed by it, running or managing its trains, when such wrongful, careless, or negligent acts result in injury to such passengers, and are committed in connection with the business intrusted to them, and springing from or growing immediately out of such business; and that defend

Instructions—
Setting down
passengers—
Duty of com-
pany.

ant, as such railroad company, is bound to exercise the strictest vigilance in carrying passengers to their destinations, *and in setting them down safely thereat*, and are responsible for want of care and foresight in doing it, and are amenable to the direct and immediate consequences of errors committed by it in so doing. If, therefore, the jury believe from the evidence in the cause that the caboose in which defendant transported plaintiff and his family, at the time referred to by the witnesses in this cause, was not allowed to remain standing still such reasonable and sufficient length of time as to enable plaintiff, by the exercise of reasonable diligence, to *safely remove himself, his wife, and minor children, with such baggage as they had with them, from said car*, but while plaintiff was using reasonable diligence to so remove his said family and baggage from said caboose, it was, by defendant, suddenly and violently, and without notice to the plaintiff, struck by the other parts of the train to which it belonged, and by reason of the shock so produced John Henry Hurt, the minor son of plaintiff, was precipitated from the platform of said caboose, under said train, and injured as described in the petition, then said facts constitute negligence on the part of the defendant, and the jury should find the issue in this cause for the plaintiff, and assess his damages at a sum not to exceed five thousand dollars."

This instruction was erroneous in the particular that it asserts that "such railroad company is bound to exercise the strictest vigilance in carrying passengers to their destination, *and in setting them down safely thereat*. This, in its latter portion, states the law too strongly in favor of the plaintiff. All the duty the law imposes upon a conductor, acting as the agent of a corporation, in order to comply with the obligation of the carrier to a passenger, is to carry him safely to his point of destination, announce the arrival of the train at the station, and give him a reasonable opportunity to leave the cars. When this is done the duty of the conductor ceases. *Sevier v. Railroad*, 18 Am. & Eng. R. R. Cas. 245; *Straus v. Railroad*, 75 Mo. 185; s. c., 6 Am. & Eng. R. R. Cas. 384. And when the servants of a corporation, engaged in the business of a common carrier, afford passengers a reasonable time to leave the cars after arrival at the end of their journey, they have the right at the expiration of such reasonable period to presume that all the passengers whose place of destination is then reached have done what is customary for passengers in like circumstances to do, to wit, have left the cars. When such a reasonable time has thus elapsed, it is no part of the duty of the servants of such corporation to make personal inspection of, or to interrogate the remaining passengers, to

see whether they intend leaving the cars. The law imposes no such onerous duty upon a carrier of passengers. And if it should appear in evidence, in any given case, that passengers similarly situated as to age, sex, etc., have safely left the cars, prior to any injury or accident complained of, this would afford ground for legitimate inference by the jury that sufficient time had been granted to the passenger who sues for a negligent injury to have alighted in safety. It is true that in *Kelly v. Railroad*, 70 Mo. 604 (*loc. cit.* 609), where, speaking of the duties of a common carrier towards passengers, it is said "that persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance in carrying passengers to their respective destinations, and in *setting them down safely*;" but an examination of that case as a whole will clearly show that the words I have italicized were not intended to be taken in a literal sense; for there the cars *did not stop at all*, but only, in railroad parlance, "slowed up," and Kelly, in attempting to alight, was killed. General expressions in an opinion are always limited and controlled by the particular facts of the given case; and it is a very unsafe method for a practitioner to select such general words and incorporate them into an instruction as a guide to a jury, and as announcing a practical principle of law. The error now being commented on was committed in a more palpable form in the eighth instruction for plaintiff, which told the jury that the defendant, in "so carrying such minor son of plaintiff thereon, is to be held to the same degree of diligence in carrying to and *safely landing* plaintiff's said minor child at his destination, as though," etc. Taking these two instructions, the jury may well have thought it the duty of the company to have taken the child *bodily* and placed it safely on the ground. Such instructions as these would make common carriers the *guardians* of their passengers. Considerable criticism has been indulged in by counsel for defendant relative to that portion of the second instruction which says that the train should have been allowed "to remain standing still such reasonable and sufficient length of time as to enable plaintiff, by the exercise of reasonable diligence, to *safely remove himself, his wife, and minor children, with such baggage as they had with them*, from said car." This objection is not well taken; nor this criticism well founded. When a man becomes a passenger on a railroad car, with his wife and little ones, he is their guardian and protector; he has the supervision of their safety; and the family group, so far as the act of debarkation from the cars is concerned, is to be regarded to all intents and purposes as a *unit and indivisible integer*; and the same rule which ac-

cords to that family group a reasonable time in which to debark, must of necessity include within it the right to take their personal belongings or baggage along with them when in the act of leaving the car. The principle recognized in the plaintiff's fourth instruction is not the correct one. The doctrine of "comparative negligence" has never been recognized in this State. In *Straus v. Railroad*, *supra*, which was a passenger case, the true rule as to contributory negligence in such cases was thus announced: "That when the concurring negligence of the plaintiff proximately contributes to produce the injury complained of, there can be no recovery, unless such injury is also the direct result of the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him."

3. Relative to the damages recovered. It is claimed by the defendant's counsel that they are excessive. The testimony is to the effect that the boy's services would be worth \$100 per year from his tenth to his twenty-first year,—until he attained his majority. This at the most would be \$1100; but doubling that sum, it would amount to but \$2200, or less than half the recovery. This is not a vindictive action; there were no circumstances of aggravation in the case, and therefore the law will confine the recovery to compensatory damages, and will not allow those which are punitive in their nature. In *Railway v. Brown*, 26 Kan. 458; s. c., 6 Am. & Eng. R. R. Cas. 228, Brewer, J., said: "We cannot agree that the theory of the law is to punish for the mere negligent destruction of life; and the law of compensation means that no more should be given to the next of kin than they probably would receive from the decedent if his life had not been taken away. . . . The statute does not contemplate a speculation on the probable earnings of the deceased; it simply aims to make good to the survivors that which they have probably lost by his death." Another case, that of *Railway Co. v. Barker*, 33 Ark. 369, is quite in point. It was an action for killing a boy five years old, and the jury assessed the damages at \$4500. The judgment was reversed on the ground of excessive damages, and in commenting on the amount of the verdict, English, C.J., said: "We are satisfied that if the facts of the case were submitted to one hundred impartial men of sound discriminating judgment, of experience and observation in the raising of children, properly instructed in the law as to the measure of damages, ninety-nine, if not all of them, would say that the damages awarded in this case for loss of probable service were excessive; and such is our judgment." The case just cited is an instructive

Damages held excessive.

one giving many instances in which courts of different States have passed upon questions of excessive damages having been awarded. See also the case recently decided by this court,—*Parsons v. Railroad Co.*, 6 S. W. Rep. 464.

For the errors aforesaid, the judgment is reversed and the cause remanded.

All concur.

Opinion of Witness, not Expert, as to Damages Not Admissible.—See *Wichita, etc., R. Co. v. Kuhn*, 33 Am. & Eng. R. R. Cas. 159, note, 161; *Central R. Co. v. Senn*, 27 Ib. 304; *Houston, etc., R. Co. v. Burke*, 9 Ib. 59.

Excessive Damages for Causing Death of Minor Child.—See *Union Pac. R. Co. v. Dunden*, and note, *ante*, p. 88.

GULF, COLORADO AND SANTA FÉ R. CO.

v.

MANNEWITZ.

(*Texas Supreme Court, February 21, 1888.*)

Passenger—Personal Injuries—Instruction—Weight of Evidence.—In an action against a railroad company for damages for personal injuries to a passenger, the court charged the jury that the burden was upon the plaintiff to show the extent of his injuries; that he was entitled to recover only for such injuries as he sustained from the accident, and that he was not entitled to recover for any disease that proceeded from any other cause. *Held*, that the jury must have inferred from the charge that they were to consider the whole evidence, and that it was not open to the objection that it led the jury to believe that they were to find for plaintiff if he showed by the evidence of his own witnesses that his condition was the result of injuries received in the accident.

Same—Medical Treatment—Obedience to Physician's Orders.—The plaintiff's attending physician testified that it was impossible to keep plaintiff in bed; that plaintiff averred that slight exercise relieved him of pain; that this was a characteristic of the disease; and that confinement in bed would have been beneficial. *Held*, that this testimony was not sufficient to call for a charge limiting plaintiff's recovery to such damages only as he would have sustained had he followed his physician's instructions.

Same—Pleading.—In an action for personal injuries the petition alleged generally that plaintiff was "injured in his spine, chest, head, and limbs." *Held*, that the allegation was sufficiently comprehensive to embrace a heart disease, or an aneurism of the blood-vessels situated in the chest.

APPEAL from district court, Galveston County.

Action by A. N. M. Mannewitz against the Gulf, Colorado

& Santa Fe R. Co. for damages for personal injuries alleged to have been caused by defendant's negligence. There was a judgment for the plaintiff, from which the defendant appeals. The third assignment of error referred in the opinion is that the court refused to instruct the jury at defendant's request that, "it not being alleged in the petition that the heart disease, if any, or the aneurism of the heart, or of the aorta, if any, were caused by the railroad accident, you cannot regard the same, and shall allow plaintiff no damages on account of the same."

Gresham, Jones & Spencer for appellee.

GAINES, J.—This was an action for personal injuries brought by appellee against appellant. Appellant's statement concedes that the evidence was sufficient to warrant the verdict, but it is complained that the court erred in refusing instructions asked on behalf of the defendant in reference to the amount of damages plaintiff was entitled to recover. It is insisted, under the first assignment of error, that the court's charge upon the burden of proof as to the extent of plaintiff's injuries was incomplete, and that therefore the court erred in refusing a special instruction asked for defendant to the effect that the burden was upon plaintiff to show, by a preponderance of evidence, that the disorders with which he was afflicted were the result of the railroad accident. The theory of the plaintiff was that he was suffering from "spinal concussion" caused by the accident; but that of defendant was that his sufferings proceeded mainly, if not wholly, from a disease of the heart or blood-vessels, which had their origin in some other source. Upon this question the evidence was very conflicting. Such being the issue made by the testimony, the court in its general charge gave the following instruction: "The burden of proof is on the plaintiff, Mannewitz, to show the extent of his injuries, which were caused by the turning over of the car. If you believe, from the evidence, that the plaintiff, Mannewitz, had heart disease, or other complaint, at the time of the turning over of the coach, then he would not be entitled to recover damages for such heart disease, or other complaint, but would be confined to damages only for his injuries which were caused by the upsetting of the coach. If you believe from the evidence that the plaintiff, Mannewitz, is suffering from any disease in the head or back, yet unless you believe, from the evidence, that such disease of the head or back was caused by the overturning of the coach, the plaintiff, Mannewitz, would not be entitled to damages for the disease of the head or back. The plaintiff is entitled to recover damages for

whatever injuries you believe, from the evidence, he has sustained by the overturning of the coach, if you believe, from the evidence, that the overturning of the coach was caused by the negligence of the defendant company or its employees." It is contended that this instruction is calculated to lead the jury to believe that if the plaintiff showed, by the evidence of his own witnesses, that his condition was the result of injuries received in the railroad accident, they

Instruction as to weight of evidence. should find accordingly, without taking into consideration the evidence of defendant, and weighing all the testimony together. But we do not so consider it. The jury were told that the burden was

upon the plaintiff "to show the extent of his injuries;" that he was entitled to recover only for such injuries as the jury "believed, from the evidence, he had sustained by the overturning of the coach;" and, in effect, that he was not entitled to recover for any disease that proceeded from any other cause. This means that the jury were to consider the whole evidence, and not merely that introduced for the plaintiff, and was not calculated to mislead any competent juror. If the finding had been against the weight of the testimony, the criticism upon the charge may have been entitled to more consideration. But taking the whole evidence together, it satisfactorily sustains the verdict, and leaves us no reason to think the jury were misled by the charge of which appellant complains. A charge that the plaintiff was entitled to recover for such injuries as he had shown, by a preponderance of evidence, to be the result of the accident, would have been favorable to him, and the omission of such a charge was therefore not prejudicial to the defendant.

A party who receives an injury resulting from the negligence of another, and who neglects to use the proper means to effect a recovery, cannot recover for the aggra-

Medical treatment—Obedience to physician's orders. vation of his injuries accruing from such neglect. This is but a branch of the doctrine of contributory negligence. In this case it appeared that plaintiff was injured on his way to his home in Abilene.

After the accident he continued his journey to Temple, and from that point took the next train to his home. Upon his arrival he placed himself under the treatment of a physician, and, it is to be inferred, continued under such treatment for several months. His attending physician testified: "It was impossible to confine Mr. Mannewitz to his bed. He averred that slight exercise relieved him of pain. This, I believe, is characteristic of the disease. He has been such an active, stirring man that it was impossible to control him." And

again: "Mr. Mannewitz did not observe the strict quietude when he was first injured that he ought to have done. His pain made him restless and uneasy. How much harm his restlessness has done him I can't say, but I believe confinement to his bed would have been beneficial." Other physicians testified to the effect that, in case of spinal concussion, rest and quiet were proper treatment, and were very important in order to secure a recovery. The defendant requested the court to give the following special instruction: "If you find, from the evidence, that after the plaintiff received his alleged injuries in the railroad accident, by the exercise of reasonable care and caution, and by following the directions of his doctor, he could have been cured, then you will and can find damages only to the time when you believe he could have been so cured." The refusal of this charge is also assigned as error. It seems to us that the charge assumes certain facts which there was no evidence to establish. But, waiving this, the question is, Was it proper for the court to give a charge upon this subject? The attending physician who testified in the case was a witness for the plaintiff, but his testimony indicates that he was willing to state any fact within his knowledge pertinent to the case. If defendant wished to make an issue upon the matter of plaintiff's conduct after the injury as affecting his recovery, by proper interrogatories to the witness, it might have proved whether plaintiff followed his physician's directions or not. As his testimony stands, incidental remarks merely create a surmise that the plaintiff may not have followed his treatment. The witness does not say that he was told of the importance of keeping quiet, or that he knew that moving about would retard his recovery. The physician does state, however, that motion removed his pain. One who has received a physical injury at the hands of another cannot be expected to know in every instance the most prudent thing for him to do, and should not be held negligent because his sufferings are such that they compel him to a course not favorable to his recovery. There is evidence here that plaintiff did not pursue the most beneficial course for the treatment of his injuries, but there is a mere conjecture that he knew of this, or had been seriously advised as to the proper course to pursue. It requires something more than a mere scintilla of evidence of a fact in order to authorize the question of its existence to be submitted to the jury. *Railway Co. v. Faber*, 8 S. W. Rep. 64 (present term), and cases there cited. We think the court did not err in refusing the instruction.

Neither is the third assignment of error well taken. The

petition did not undertake to give a specific catalogue of the plaintiff's injuries. It alleged, however, that he was "injured in his spine, chest, head, and limbs," and this is sufficiently comprehensive to embrace a heart disease, or an aneurism of the blood-vessels situated in the chest. The special instruction under consideration would have excluded such diseases from the computation of the damages, although the jury may have believed that they were produced by the injury. The court did not err in refusing the charge.

Pleading—Allegation of injuries sufficient.

There is no error in the judgment, and it is affirmed.

PHILADELPHIA TRACTION CO.

v.

ORBANN.

(*Pennsylvania Supreme Court, February 27, 1888.*)

Personal Injuries—Newsboy—Employee—Statutory Limitation of Recovery.—A newsboy engaged in selling newspapers, and permitted to pass in and out of traction cars for that purpose, but not engaged or in any way employed by the company, is not an employee on or about the road of the company within the meaning of the Pennsylvania statute, giving persons so engaged or employed such right of action and recovery only as would exist if such person were an employee.

Same—Punitive Damages—Liability of Corporation—Previous Authority—Ratification.—In an action against corporations for injuries received through the negligence of their servants, exemplary damages may be recovered, when the injuries are wanton and malicious, or are inflicted in a gross or outrageous manner, although the act may not have been previously authorized or subsequently ratified by the corporation.

Same—Act of Conductor.—In an action by a newsboy to recover damages for personal injuries, it appeared that he was engaged in selling papers on street cars; that when on the point of leaving the car he stopped to allow a wagon to pass; that the conductor pushed him on the arm and he fell upon the street and was run over. There was no evidence that the act was wilful or wanton, or that the conductor was moved by feelings of violence, outrage or reckless indifference to consequences. *Held*, that upon the evidence the plaintiff was not entitled to recover exemplary damages. Sterrett, J., dissents.

ERROR to Court of Common Pleas, Philadelphia County.

Action by Charles T. Orbann, by his next friend Harry McNight, against the Philadelphia Traction Co. to recover damages for personal injuries. There was a verdict and judg-

ment for plaintiff, from which defendant appeals. The provision of the act of April 4, 1868 (P. L. 58), referred to in the opinion is as follows: "When any person shall sustain personal injury, or loss of life, while lawfully engaged or employed on or about the roads, depot, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee: provided, that this section shall not apply to passengers."

Gavin W. Hart and David W. Sellers for plaintiff in error.

A. S. L. Shields for defendant in error.

CLARK, J.—Charles T. Orbann brings this suit against the Philadelphia Traction Co., to recover damages for a personal injury received through the alleged negligence of the company's servants. It is contended on part of the company, in the first place, that Orbann, at the time of the injury, was engaged or employed on or about the road or cars of the company, within the meaning of the act of 4th April, 1868 (P. L. 58), and, therefore, that his right of action and recovery was only such as he would have if he were an employee of the company; that the conductor must be regarded as a fellow-employee, and if the injury arose from the conductor's act, the company is not liable. We are not inclined to favor that view of the case. Orbann was a newsboy engaged in selling newspapers; his employment was not on the cars; he was only casually there; he sold to all, whether in or out of the car, and was suffered to pass in and out for this purpose at his pleasure. He was not a trespasser, however. The usage of the company, at that time, was to permit newsboys upon their cars without objection; but while he was on the car, he was neither engaged nor employed in the performance of any act or business connected with the road or its works. As well might we say that those who, in the regular course of business, pass with wagons, etc., up and down the company's tracks, in case of injury from the company's negligence, would be regarded as employees, because they were at the time engaged or employed on or about the company's road. It is certainly absurd to suppose that the act of 1868 was intended to have any such application. The persons who were in contemplation of the legislature in the act of 1868 are those who, although not employees of the company, are nevertheless engaged or employed on or about the company's road or works, in the performance of some act or business connected therewith.

Facts.

In the second place, the company contends that the court erred in the general charge as to the measure of damages, according to which the plaintiff was entitled to recover, if the jury should find in his favor. "He is entitled," says the learned court, in the general charge, "to have compensation for the pain and suffering he has undergone, or is undergoing, or is likely to undergo, by reason of his injuries. He is entitled to recover for whatever may be the value of any diminution of his power, as an earner of wages, in the support of himself. If his capacity for earning has been in any way diminished by this accident, he is entitled to money compensation for the value of that diminution. He is entitled to be compensated, in other words, for all the substantial injury to his capacity to earn money, and for all the injury to his comfort and happiness, and for all the pain and suffering he has undergone as a result of his accident. These are the elements that he is entitled to receive compensation for. In addition to that, if you should find in this case wanton and wilful misconduct on the part of the agent and servant of this defendant corporation, you would be entitled to give this plaintiff such damages as you should consider in your judgment as punitive as a punishment for such wilful and wanton misconduct, but only if you should find it to be wilful and wanton."

Instruction as to measure of damages.

It is contended that, as there was no proof of any previous direction, or of any subsequent ratification of the conductors' act on part of the company, the court erred in permitting the jury to impose punitive damages; in other words, that the company cannot be punished for the wanton and wilful act of a mere agent. It seems to be settled by the preponderance of authority in this country that, in actions against corporations for injuries received through the negligence of their servants, exemplary damages may be recovered, when the injuries are wanton and malicious, or are inflicted in a gross or outrageous manner, whether the act was previously authorized or subsequently ratified by the corporation or not. It is scarcely necessary, we think, to refer in detail to the numerous cases in which this doctrine is asserted. Some of them are collected in Sedg. Dam. 329, note, and in Sedg. Lead. Cas. 746, note; and we may cite the following cases, among many others, sustaining this view of the law: *Railroad Co. v. Dunn*, 19 Ohio St. 162; *Railroad Co. v. Bryan*, 90 Ill. 166; *Hopkins v. Railroad Co.*, 36 N. H. 9; *Railroad Co. v. Larkin*, 47 Md. 155; *Goddard v. Railway Co.*, 57 Me. 202; *Evans v. Railroad Co.*, 11 Mo. App. 463; *Railroad Co. v. Kendrick*, 40 Miss. 374; *Bowler v. Lane*, 3 Metc. (Ky.) 312; *Railroad Co.*

When corporations are liable in exemplary damages for acts of servants.

v. Quigley, 21 How. 202; *Railroad Co. v. Arms*, 91 U. S. 489. In New York and some other States the law would appear to be otherwise. *Cleghorn v. Railroad Co.*, 56 N. Y. 44. In Massachusetts, damages would seem to be given in such cases, on the ground that wantonness in the wrongful act is an aggravation of the injury. They are said to be given not as a punishment, however, but as a compensation for the added insult and increased mental distress, which arise where the injury is inflicted through malice, etc. In Pennsylvania, since the case of *Railroad Co. v. Rosenzweig*, 113 Pa. St. 519; s. c., 26 Am. & Eng. R. R. Cas. 489, the rule would seem to have been settled in accordance with the preponderance of the cases. In that case, Rosenzweig entered the cars at Cleveland. He was riding upon what was known as a "round-trip ticket," and it was alleged that, according to the regulations of the company, this form of ticket was not good on that train. When the conductor entered the car, and called "Tickets," Rosenzweig handed his ticket to the conductor, who handed it back, and pulled the bell-cord to stop the train. The conductor told him his ticket was not good, and he had orders to put him off. Rosenzweig insisted that his ticket was good, but offered to pay his fare. The conductor then said: "My orders are to put you off, and off you must go. Come." Rosenzweig said: "For God's sake, don't put me off here; carry me to a station." The conductor replied: "My orders are to put you off, and off you must get; I obey orders if I break owners." Rosenzweig was compelled to leave the train. He was a mile or more from the Cleveland depot; was in the dark, in a strange place, in the midst of many railway tracks, with cars and locomotives passing and repassing. While groping his way, he received the injury for which he sued the company. Our Brother Trunkey, in writing the opinion of this court, said: "If there was no wilful misconduct by the conductor, how can it be said that he was not recklessly indifferent to the consequences likely to befall the plaintiff? If the suit were against him there could be little question that the jury would be permitted to give exemplary damages. The liability of railway and other corporations to exemplary damages for gross negligence is well settled. The general rule in cases for negligence is that only compensatory damages can be given. Juries are not at liberty to go further than compensation, unless the injury was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to a violation of them. There must be wilful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences. *Railway Co. v. Arms*, 91 U. S. 489. The

corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such rights to the plaintiff, as against the servant, were the suit against him, instead of the corporation." There may be grave doubts expressed as to the propriety of the rule, but if the doctrine of this case is adhered to, the responsibility of a corporation, in exemplary damages, for the wanton and wilful acts of its servants, is clearly established in Pennsylvania.

But, under the evidence, was this a proper case for punitive damages? The rule that imposes this measure of damages is a severe one at the best, and if the master must not only compensate the injury, but may be held up as a public example, in the payment of "smart money," for the wanton and malicious act of another,—an act he neither authorized nor approved, and of which he may be wholly innocent,—merely because of the existing relation of master and servant, the plainest principles of justice require that great caution should be observed in its application. Moreover, the well-known disposition of juries to return excessive verdicts in this class of cases has shown that the doctrine, although designed for the promotion of the public good, is capable of great practical abuse. It is upon this ground, more than any other, perhaps, that the rule has not been universally recognized. Exemplary damages are allowed only where the act complained of has been committed wilfully and maliciously, or, in the absence of actual malice, where it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness. *Nagle v. Mullison*, 34 Pa. St. 48. When there is no evidence which would fairly justify a jury in finding that the wrongful act was of the general character stated, the question of exemplary damages should not be submitted to the jury. In the absence of proof of these circumstances of aggravation, compensation merely is the rule. *Nagle v. Mullison*, *supra*. To leave the question of punitive damage to the jury, when there is no evidence which would warrant a verdict for other than compensatory damages, or even to instruct them that they may find such damages as they may see proper, is error. *Railroad Co. v. Taylor*, 104 Pa. St. 306; *Rose v. Story*, 1 Pa. St. 190; *Amer v. Longstreth*, 10 Pa. St. 145. Therefore, in *Railroad Co. v. Slusser*, 19 Ohio St. 157, where a passenger had been ejected from a train by mistake, or on misconception of his rights by the conductor, it was held not to be a proper case for exemplary damages, and upon that ground the judgment was reversed. So, in *Railroad Co. v. Quigley*, 21 How. 213, an action of libel, in which exemplary damages were

Same—
Authorities.

given, Mr. Justice Campbell said: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation." But as nothing of this kind, under the evidence, could be imputed to the defendant, the judgment was reversed. In *Railway Co. v. Arms*, 91 U. S. 489, the bill of exceptions disclosed this state of facts: Mrs. Arms, in October, 1870, was a passenger on defendant's train of cars, which, while running at a speed of 14 or 15 miles an hour, collided with an engine on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines, however, were demolished and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision, and the cause of it, but there was evidence tending to show that Mrs. Arms was thrown from her seat, and sustained the injury of which she complained. After the evidence had been submitted to the jury, the court gave them the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." Mr. Justice Davis, delivering the opinion of the court, said: "The jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done wilfully, or was the result of that reckless indifference to the rights of others, which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require." . . . To do this, however, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train, and the court, therefore, misdirected the jury. In the case at bar the facts are few and simple. The plaintiff, who was a boy of 13 years of age, relates the occurrence thus: "There were two cars coupled together, and it was coming along, and I jumped on the first one. I halloed out my papers, and it was pretty near Third Street. There was a wagon coming along. I did not want to jump off, for fear the wagon might run over me. I stood on the bottom step. People wanted to get on. The conductor shoved me on the arm, and turned me around, and I fell between the two cars. I fell on the ground, on my side, I think; near the track;

Evidence examined—Not a case for exemplary damages.

between the track and the crossing, I guess. I fell between the two of them (the wheels). I was standing like this, on the bottom step, and he pushed me in this way (indicating), and I turned right around, and fell between the two cars. It was the hind car that ran over me." Mr. Kathatine, in corroboration, says he saw the conductor raise his arm as if to push the boy off; but whether he touched him or not, he could not say. Mr. Haley says that there was a wagon passing, and the conductor put his arm out, and pushed him; that the boy held on to the rail, then dropped his grip, and fell under the wheels. On the contrary, the conductor testifies that he did not push the boy off, nor intend to do so; that he did not touch him at all,—and in this he is supported by several witnesses. The jury has found, however, that he did push him off; that in consequence thereof the injury occurred; and our further consideration of the case must proceed upon the presumption of the fact thus found. But was the act accompanied by circumstances which would characterize the conductor's conduct as wilful and wanton, reckless or oppressive? Jones was the conductor of the car. His duty was to clear the way for the exit and entry of the passengers without unreasonable delay. The plaintiff, while privileged to enter and leave the car, was there by the conductor's permission only. He was standing on the lower step of the car, which was approaching the crossing, and there were passengers at the crossing, who wished to enter the car. The conductor, without rudeness, and with proper care that the boy should receive no injury, had a right, as soon as the car should stop, to hasten the little boy's exit, in order to facilitate the admission of the passengers. There had been no previous ill will on the part of the conductor towards the boy. There was not an unkind word spoken. All that appears is that the conductor pushed him "on the arm." Whether this push was a gentle or violent one; whether it was given in anger or wantonness, or merely as a suggestion that the lad must make way for the passengers, is not shown. There is nothing to show that the conductor intended to push him off, or, indeed, to do the boy any harm. The mere fact that he pushed him on the arm does not indicate that the act was wanton or malicious. There are no circumstances, we think, which would justify a jury in finding that the act was wanton and wilful, or that the conductor was moved by any feelings of violence, outrage, or reckless indifference to consequences. For all that appears, we might well suppose that the conductor, in the effort to despatch his duty, was wholly unconscious of the fact that he pushed the boy on the arm. There can be no justification, of course, for

the negligent act of pushing a little boy off a moving car, and for the consequences of such an act the unoffending party will ordinarily be held to compensate the injury. But whether he will be also punished for the act must depend upon the manner, or the motive, in which the act is done. In the retrial of this case care must be taken also that the plaintiff shall not be allowed to recover for any matter or thing to which his father may be entitled, in any action pending or to be brought, for damages resulting to him from the same injury.

The judgment is reversed and a *venire facias de novo* is awarded.

STERRETT, J., being of opinion that the instruction as to exemplary damages was fully warranted by the evidence, dissents.

Who are persons "engaged or employed on or about the roads," etc., within Pennsylvania Statute.—See *Pennsylvania R. Co. v. Price*, 1 Am. & Eng. R. R. Cas. 234; *Cummings v. Pittsburgh, etc., R. Co.*, 4 Ib. 524.

Recovery of Exemplary Damages for Torts of Servants.—See *Lake Shore, etc., R. Co. v. Rosenzweig*, 26 Am. & Eng. R. R. Cas. 489; *Western & Atlantic v. Turner*, 28 Ib. 455, and note, 458, where cases are collected.

AUGUSTA AND SUMMERVILLE R. Co.

v.

RANDALL.

(*Georgia Supreme Court.*)

Passenger—Personal Injuries—Evidence—Res Gestæ.—Statements made by a passenger after she had fallen in alighting from a car, had recovered herself, obtained the driver's name, gone home, and then gone to her sister's house, cannot be received as part of the *res gestæ*, even under the Georgia statute, which declares that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or after-thought, are admissible in evidence as part of the *res gestæ*."

Same—Instruction—Remote Damages.—In an action for damages for injuries to a female passenger, in which the only evidence introduced referred to the injuries she sustained and to a miscarriage or abortion caused by, and great pain suffered in consequence of the injury, an instruction that "if the damages are only the imaginary result of the tortious act, or other and continuous circumstances preponderate largely in causing the injurious effect, such damages are too remote to be a basis of recovery against

the wrong-doer; and damages traceable to the act, but not its legal or material consequences, are too remote or contingent," is properly refused.

Same—Punitive Damages.—An instruction in an action to recover for personal injuries, that the facts in evidence to authorize punitive damages must be such as would subject the defendant's servant to liability to conviction for criminal negligence if prosecuted therefor, is properly refused.

Same — Presumption of Negligence — Statute — Constitutionality. — A statute which declares that in all cases where passengers are injured the presumption shall be against the company, being simply declaratory of the common law, is not a statute abridging the privileges and immunities of a citizen in violation of U. S. Const. Art. 14.

ERROR to Superior Court, Richmond County.

Action to recover damages for personal injuries. The defendant appeals from a verdict and judgment for plaintiff. The opinion states the case.

F. H. Miller, W. K. Miller, and J. S. & W. T. Davidson for plaintiff in error.

Twiggs & Verdery for defendant in error.

BLANDFORD, J.—This was an action brought by Hattie A. Randall and her husband to recover damages against the Augusta & Summerville R. Co. for injuries which she alleged she had sustained by reason of the negligence of the servants of the company in throwing her from one of its cars, thereby injuring, wounding, and bruising her, and causing her great pain and suffering. A verdict was had for the plaintiffs in that action, in which the jury assessed her damages at \$1000. A motion for new trial was made by the street-railroad company on various grounds.

1. The first ground of error is that "the verdict is contrary to the evidence, and the principles of justice and equity."

Verdict not contrary to evidence. We think there is nothing in this ground. There was enough evidence, if the jury believed the testimony of the plaintiff, to have authorized this verdict; and we do not see where the principles of justice and equity have been violated in the finding of the jury.

2. The next ground is that "the court admitted in evidence, over the objections of defendant's attorneys, the testimony on the cross-examination of Miss Keener, consisting of the contents of an *ex parte* affidavit read to the witness

Deposition—Answers from memoranda. bodily, but not annexed to the deposition, and not before the court, or accompanying or offered as an accompaniment to this testimony; the ground of objection at the time of the examination being as follows: That all testimony referring to this paper (which was identified by the witness, and marked 'Exhibit A') should be excluded, unless such paper should be delivered to the commissioner by

counsel for plaintiffs, and annexed to the deposition; counsels for plaintiffs contending that the testimony of the witness in relation to such paper should stand as a part of the deposition, and declining to deliver up the paper. These objections were renewed on the trial as to this testimony; and an inspection of the paper, which had been called for under notice, demanded that the court might determine the force of the objection. All of which objections were overruled, and the paper was not produced, or ever placed in evidence, by the plaintiffs; and the evidence was admitted, over said objections, without inspecting the paper." To understand this ground properly: The defendant sued out a commission to take the testimony of Miss Keener. Counsel for the plaintiffs and for the defendant both appeared before the commissioner, in the manner provided by the Code, and examined the witnesses orally, instead of by written interrogatories. On cross-examination, counsel for the plaintiffs put to the witness the question if she had not made a certain affidavit, and thereupon read to her the affidavit, the contents of which were taken down by the commissioner, and fully set out in the deposition, and returned to the court as a part of the testimony of the witness. Counsel for the defendant, who had sued out the commission, objected to this testimony, on the ground that the affidavit must be annexed to the return made by the commissioner. The objection was founded upon section 3887 of the Code, which says that witnesses may write out their own answers in the presence of the commissioners, and by their consent; and, if the witnesses answer from written *memoranda*, such *memoranda* shall be sent with the commission, and the fact certified by the commissioners. We think the learned counsel mistake the application of this rule. It clearly does not apply in a case of this kind, where the affidavit was read to the witness, and was fully set out by the commissioner, and the witness examined as to whether she made it, etc. We think that was all the law required should be done. The plaintiff in error, therefore, can take nothing by this exception.

3. The fourth ground is of a more serious character. It is as follows: "Because the court admitted in evidence, over the objection of defendant's attorneys, on direct examination, and after Mrs. Randall had testified, as a part of the *res gestæ*, the statement made by Mrs. Hattie Randall to her friend and relative, Mrs. Shellman, who resided at a distance of a block and a half from the place of the accident, and opposite her own residence, and to whose house Mrs. Randall went after first going to her own home. The whole of this testimony ap-

Admissibility
of plaintiff's
declarations
as part of
res gestæ.

pears in the brief of testimony, but the particular objectionable portion is the statement that she rung the bell, and the car stopped before she attempted to get off, and then started and threw her from the platform; defendant's attorneys insisting that this was hearsay testimony, and inadmissible as a part of the *res gestæ*."

It appears, in this case, that after Mrs. Randall was precipitated from this car upon the ground, and immediately after she had gotten up, picked up her bundles, and brushed herself, the first thing she did was to secure the name of the driver of the car. According to her testimony, she knew him very well by sight, having ridden in the same car with him often before; but after this occurrence the first thing she did was to inquire his name. She then went to her house, which was a block and a half off,—150 or 200 yards,—entered her house, and deposited her bundles. She then left, and went across the street, to where Mrs. Shellman, her sister-in-law, lived, and while there made a statement to Mrs. Shellman as to how she was hurt. When Mrs. Shellman was introduced to prove what Mrs. Randall said to her, objection was made to her testifying on that subject. She testified in this way (Mrs. Randall having testified first): That when Mrs. Randall came into her house she was greatly excited, and, in reply to Mrs. Shellman's inquiry as to what was the matter, she told her she had been thrown off the car, and was hurt, and how she came to be hurt. Thereupon Mrs. Shellman got her a glass brandy, made some tea and gave it to her, and put her to bed. It does not appear at what particular time she made this statement to Mrs. Shellman. Mrs. Shellman went on to testify that what Mrs. Randall stated to her at her house on that occasion was what she (Mrs. Randall) had sworn to on the trial of this case; but how long after the occurrence she made this statement to Mrs. Shellman does not appear in the record. Mrs. Shellman merely testified that what Mrs. Randall had stated in her testimony was the same thing she told her; but did not state what Mrs. Randall did tell her. The court, under these circumstances, admitted this testimony of Mrs. Shellman as part of the *res gestæ*.

As we understand it, *res gestæ* are things connected with transactions taking place and stated at the time of the transaction; but that doctrine has been somewhat extended by our courts. Our Code declares (section 3773) that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or after-thought, are admissible in evidence as part of *res gestæ*." Declarations not connected with the transaction, nor bearing upon it, or serving to illustrate it, although made at the very time the act was

committed, are not admissible in evidence; they must be connected with the main act. And it is the duty of the court, when testimony of this sort is offered, to determine, before it goes to the jury, whether the declarations were connected with the main act, or so nearly connected in point of time as to be free from all suspicion of device or after-thought. The court must determine this before admitting the testimony to the jury; and after it goes to the jury they may also consider it, and determine what it is worth, under a proper charge from the court.

Under the facts as they appear in this record, were these declarations connected with the transaction? They were not made at the time of the act complained of; but were they so nearly connected with this main fact in point of time as to be free from all suspicion of device or after-thought? Upon recovering herself, after this occurrence, the first thing she did was to inquire the driver's name. What for? What was her object? What was her purpose in inquiring the name of this driver, whom she knew well by sight, and with whom she was personally acquainted, having ridden with him frequently on the car? Is that free from all suspicion that she had an ulterior purpose or design in making this inquiry? Does it not give rise to the suspicion that she was fixing for a case against this street-railroad company? Does it not have that appearance? This was done after the act was over. She then went to her own house, 150 or 200 yards off, and put away her bundles; then crossed the street, and went to her sister-in-law's house, and while there entered into the details of how this thing occurred. We are of the opinion that the court did wrong to admit this as a part of the *res gestæ*. It is not free from all suspicion; it is not connected with the transaction so closely in point of time as to be free from all suspicion of device or after-thought? The suspicion might arise in the mind of any man that here was device or after-thought. She inquired that driver's name for some purpose. She had had time to look over the field. She seemed to have known her rights, and to be preparing for them. Having done this, she went and made this relation to her sister-in-law, stated her testimony about her having rung the bell, and the car having stopped, her attempt to depart from the car, and the starting of the car without affording her a reasonable opportunity to get off,—the vital facts upon which the whole case turns. These declarations were not exclamatory upon her part upon receiving this injury; and we cannot help coming to the conclusion in our own minds that here was artifice or after-thought, or at least that it is not free from all suspicion. The court erred in not rejecting it.

We are aware that what has been said may appear to be in conflict with some of the former decisions of this court; but a careful examination of those decisions will show that they differ from the present case in their facts. The case of *Factory v. Barnes*, 72 Ga. 217, was much relied on by the counsel for the defendants in error in this case. That case must rest alone upon its own peculiar facts, and will not be extended beyond them; but it differs widely from this case in all respects except in point of time in which the declarations were made. The proximity of time in which declarations were made to the main transaction is not the only test of their admissibility in evidence, but they must be also free from *all* suspicion of device or after-thought.

The testimony admitted as *res gestæ* in this case was very material. Mrs. Randall is but feebly sustained in her statement that she rang the bell, and that the car stopped. The testimony is very strong and weighty that no bell was rung; that the car was not stopped; that she attempted to get off the car at or about the place she had often before gotten on and off, without its being stopped; and that it was not a usual place for the car to stop. But if she rang the bell, and if the driver recognized her signal, whether it was at the usual place for stopping the street car or not, then he ought to have given her a reasonable opportunity to get off, and not jeopardized her person in this way.

4. The main question in this case is, was this company guilty of negligence; and there is nothing else in it, leaving out this testimony of Mrs. Shellman, which we do not think ought to have been admitted. If Mrs. Randall made that signal by ringing the bell, or gave any other signal which the driver recognized, and if he stopped his car for her to get off, and did not stop long enough to give her a reasonable opportunity to depart from the car, then the company was negligent, in our opinion. This was a fact for the jury, and they had a right to believe Mrs. Randall in preference to all the other witnesses who testified against her. It resolves itself into that, and that alone; and that is all there is in this case, when you sweep out her being bolstered up by her sister-in-law, Mrs. Shellman. It would be hardly necessary, if the case did not go back, for us to notice another ground of exception, under our view of it.

5. Another ground of exception is that the court admitted in evidence, over objection of defendant's attorneys, the testimony of the cross-examination of Anna M. Taliaferro; this ground being the same as the third ground, relating to the testimony of Miss Keener, which we have already disposed of.

Question is,
was company
guilty of neg-
ligence?

6. The next ground is "because the court refused to charge, as requested in writing by the defendant's attorneys, as follows: 'If the damages are only the imaginary result of the tortious act, or other and continuous circumstances preponderate largely in causing the injurious effect, such damages are too remote to be a basis of recovery against the wrong-doer; and damages traceable to the act, but not its legal or material consequences, are too remote and contingent. Code, §§ 3073, 3082.'" We think the court did right to refuse that charge. We do not see where any remote damages are claimed in this case. If a person is injured by the negligence of a railroad company, the extent of the inquiry is a proper subject-matter of inquiry. How was she hurt? Did she have a miscarriage or abortion in consequence of the injury? Did she suffer great pain in consequence of the injury? All these are legitimate matters of inquiry, and are not consequences too remote; and the testimony offered in this case did not authorize the court to charge these two sections of the Code.

Remote damages—Instructions.

7. Another ground of exception is that "the court refused to charge, as requested in writing by the defendant's attorneys, as follows: 'And should it appear that the negligence of the railroad would not have damaged the party complaining, but, by the interposition of an agency over which the railroad neither had nor exercised control, she was damaged, then the party complaining cannot recover.'" We think the court did right to refuse that charge, for the reason that it was not applicable to the facts of this case.

8. The next ground is that "the court refused to charge, as requested in writing by the defendant's attorneys, that the facts in evidence, to authorize punitive damages, must be such as would subject the driver to liability to conviction for criminal negligence if prosecuted therefor." We think the court did right to refuse this charge. Punitive damages are given as a compensation for the manner in which the thing is done, and the injury to the wounded feelings of the party is taken into consideration; but there is nothing of that sort in this case, according to the evidence in the record, and nothing in the pleadings to make such a case as that.

Punitive damages—Evidence to authorize.

9. The next ground of exception is "because the court refused to charge, as requested in writing by defendant's attorney, that the act of 1855 p. 155, (now section 3033, Code Ga.), particularly in the enactment that 'the presumption in all cases being against the company,' is unconstitutional, and in violation of article 14 of the constitution of the United States, in this:

Presumption of negligence—Constitutionality of statute.

that it is the enforcement of a law which abridges the privileges and immunities of the defendant, in that it puts upon it a presumption which is not enforced against private citizens." This presumption, that where the plaintiff has shown that he was a passenger, and was hurt or damaged by the running of the railroad company's trains or machinery, the company was negligent, is a common-law presumption. It is no new thing because it was not enacted in this state until the act of 1855. It obtained at common law, and had been the law of England and of this country all the time. It puts no greater hardship upon this railroad company than upon anybody else engaged in the same or any other business. If this clause of the constitution were to be interpreted as insisted upon by counsel for the plaintiff in error, it would prevent the requirement that a man should obtain license in order to sell spirituous liquors; for why should he be required to obtain license any more than the merchant who sells dry goods, meat, etc., and who is not required to have one? Such a construction is clearly not contemplated by this fourteenth amendment. It refers to classes, and means that you shall not impose a different rule upon a man whose color is black from that imposed upon one whose color is white. That was the purpose of the amendment, that is why it was put there, and it was not intended to mean anything else. The court did right to refuse the charge requested, and, if he had given it, would have committed manifest error,

10. There are several other grounds of exception, all of them to the effect that the verdict was contrary to the charge of the court. That simply means that the verdict of the jury is contrary to law; and we do not think it is. This disposes of all these exceptions.

This case is reversed, therefore, on the assignment of error in the fourth ground of the motion for new trial, viz., the admitting in evidence of the statements of Mrs. Randall to Mrs. Shellman, as a part of the *res gestæ*.

Admissibility of Declarations made by Party Injured as part of Res Gestæ.
—See note, 31 Am. & Eng. R. R. Cas. 356; Little Rock, etc., R. Co. v. Leverett, 28 Ib. 459; Lake Shore, etc., R. Co. v. Rosenzweig, 26 Ib. 489; Louisville, etc., R. Co. v. Falvey, 23 Ib. 522; Burlington, etc., R. Co. v. Raymond, 13 Ib. 6.

OHIO AND MISSISSIPPI R. Co.

v.

HECHT.

(Indiana Supreme Court, June 16, 1888.)

Passenger—Personal Injuries—Supervening Disease—Pleading.—Under a complaint in an action for personal injuries which alleges that plaintiff was so injured that he “suffered great pain and anguish and became sick, sore, and lame, and was confined to his bed and room from thence hitherto,” evidence that the plaintiff is suffering from Bright’s disease induced by the injury complained of is admissible.

Same—Instruction—Contributory Negligence.—An instruction in an action for damages for personal injuries that “It is not enough that plaintiff may not have used ordinary care, but such want of care must have contributed to the injury to bar the plaintiff from recovery if his right to recover is otherwise shown by the evidence,” is not erroneous.

Same—Damages—Occupation of Plaintiff.—In such an action, the jury may, in estimating the damages, consider the occupation of the plaintiff.

APPEAL from Circuit Court, Jefferson County.

Action at the instance of Abraham Hecht against the Ohio & Mississippi R. Co. for damages for personal injuries. At the trial, evidence was admitted over defendant’s objection that plaintiff was suffering from Bright’s disease, induced by the injuries he had sustained. Defendant appeals from a judgment for plaintiff for \$2500.

H. D. McMullen and John McGregor for appellant.

Korbly & Ford for appellee.

ELLIOTT, J.—The appellee bought a ticket, entitling him to passage on the trains of the appellant, and while at the appellant’s station at North Vernon, for the purpose of entering one of its trains, as he was entitled to Facts. do under the ticket he had purchased, he was injured, without any fault on his part, by stepping into a hole in the platform, which the appellant, in disregard of its duty, had negligently permitted to remain unprotected. The complaint thus describes the injury sustained by the appellee, and states the damages occasioned by the wrong of the carrier: “The plaintiff was violently thrown down, and upon his valise, which he was carrying in his hand, and his foot and ankle were sprained, strained, and otherwise greatly injured and bruised,

and the ligaments and tendons of plaintiff's foot were strained and drawn and permanently injured, so that the plaintiff suffered great pain and anguish, and became sick, sore, and lame, and was confined to his bed and room from thence hitherto, and was wholly incapacitated from attending to his usual vocation, and he laid out and expended a large sum of money, to wit, \$——, for doctor's fees and medicines and nursing, in attempting to be cured of said hurt, and received a permanent injury, which will lame him for life, and always impede his successful prosecution of his business; whereby he has sustained damages in the sum of five thousand dollars." The complaint makes a case entitling the appellee to full compensation for the injury which proximately resulted from the appellant's wrong. Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages. The decisions upon this point are numerous and harmonious. *Railroad Co. v. Wood*, 113 Ind. 542 (note, 33 Am. & Eng. R. R. Cas. 530), and cases cited, 567; *Railroad Co. v. Jones*, 108 Ind. 551; s. c., 28 Am. & Eng. R. R. Cas. 170; *Railroad Co. v. Pitzer*, 109 Ind. 179, and cases cited, 188; s. c., 25 Am. & Eng. R. R. Cas. 513; *Railway Co. v. Falvey*, 104 Ind. 409; s. c., 23 Am. & Eng. R. R. Cas. 522; *Railroad Co. v. Buck*, 96 Ind. 346; s. c., 18 Am. & Eng. R. R. Cas. 234; *Railroad Co. v. Riley*, 39 Ind. 568; *Keyser v. Railway Co.*, 33 N.W. Rep. 867; s. c., 31 Am. & Eng. R. R. Cas. 399; *Quackenbush v. Railway Co.*, 35 N.W. Rep. 523; s. c., *infra*.

Complaint sufficiently comprehensive—Evidence of injuries. The complaint is sufficiently comprehensive to entitle the plaintiff to give evidence of the nature and consequences of his injury. In *Ehrgott v. Mayor*, 96 N. Y. 264; s. c., 6 Am. & Eng. Corp. Cas. 631, it was said by the court: "Upon the trial, plaintiff gave evidence tending to show that he had a disease of the spine, of a permanent nature, as the result of his injuries. This evidence was objected to by the counsel for the city, on the ground that the plaintiff had not alleged such a result from the injury in his complaint. We think the complaint is sufficient. It alleges that he suffered great bodily injury; that he became, and still continues to be, sick, sore, and disabled; that he was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business, and that he was otherwise injured, to his damage \$25,000. These allegations are sufficient to authorize proof of any bodily injury resulting from the accident; and, if the defendant desired that they should be more definite, it could have moved to have them made more specific, or

for a bill of particulars." Chief Justice Campbell said in *Johnson v. McKee*, 27 Mich. 472: "Where the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness, the origin or aggravation of which could be traced to the act complained of." In the case of *Delie v. Railway Co.*, 51 Wis. 400; s. c., 5 Am. & Eng. R. R. Cas. 464, the question before us was carefully examined and well discussed; the court saying, among other things, "that it is not claimed on the part of the appellant that the complaint does not state a cause of action. If the allegations of the injury are sufficient to entitle the plaintiff to recover anything more than nominal damages, then it seems to us very clear that he is entitled to recover such damages as he actually sustained by reason of all injuries to his person resulting from the accident, and that, in order to enable the jury to estimate his damages, he must be permitted to show what those injuries in fact were. We think that in cases of this kind, if the defendant does not desire to have the plaintiff make his allegations, as to the nature of his injuries, more definite and certain, and does not ask to have it done by a proper motion for that purpose, he must come prepared to meet any proof which the plaintiff may offer, which shows, or tends to show, the real nature of the injuries which were the direct result of the accident. This, we think, was the rule held, even under the old practice, by this court in *Richard v. Booth*, 4 Wis. 74-92. In that case the court held that, under allegations as general as in this case, the plaintiff might show, as one of the results of the battery, that his shoulder-blade was broken. The present chief justice, in his opinion, says: 'It was contended on the argument that the fracture of the shoulder-blade should have been specially and circumstantially set forth, in order to apprise the defendant of the facts to be proved, and that it was a surprise upon him to admit proof of it under the general language of wounding, beating, bruising, etc.; and, although we think such a special statement of the injury might have been very proper, yet we cannot say it was essentially necessary. As already stated, we can but view that injury as the natural and necessary result or consequence of the battery. That wrongful act was the efficient producing cause of the fracture and loss of health, and we think it is sufficient to allege it in this general manner.' See also *Schmidt v. Pfeil*, 24 Wis. 452-455. If, under the old rules of pleading, under general allegations of wounding, bruising, and beating, the plaintiff could be permitted to show all of the injuries to the person which resulted from the battery, there is much greater reason for allowing such evidence under the code

practice, which gives the defendant the clear right to have the general allegations made more specific and certain if he desires so." At another place it was said: "But counsel for the appellant urges that, as the hernia did not make its appearance until nine months after the accident, it cannot be said that it was the result of the accident, and certainly not the direct and immediate result thereof, and therefore evidence concerning it should not have been admitted under the allegations of the complaint. If the hernia had appeared immediately after the accident, under the rules above stated, there would be no doubt as to the right of the plaintiff to prove the facts as one of the results of the injury; and we think the mere fact that it did not become apparent to the plaintiff until some time after can make no difference as to the right of the plaintiff to show that it was in fact caused by the accident." Our own decisions declare the rule substantially as the cases we have cited. In *Railway Co. v. Selby*, 47 Ind. 471, it was said: "The complaint charged that the plaintiff was generally bruised, hurt, and injured. Under these general allegations, the plaintiff was entitled to prove any and all injuries which he received, and which were the natural consequence of the wrongful act of the defendant." It was said by the court, in the case of *Railway Co. v. Savage*, 110 Ind. 156, that "after Dr. Young had, as a witness, explained the nature of the injury which the plaintiff had received, and the remedy resorted to for his relief, he was, over objection of the defendant, permitted to say the effect of the injury would be very deleterious to the plaintiff's nervous as well as to his general system, and that the injury would thereafter have an injurious effect upon his strength and power of physical endurance. It is insisted that there was nothing in any of the averments of the complaint which justified the admission of such evidence, and for that reason its admission was erroneous. As will be seen by a recurrence to the complaint, it concluded with the averment that the plaintiff had 'thereby become wholly crippled and maimed, and prevented from actively pursuing his business, for life.' Under our decided cases, that averment was quite sufficient to let in the evidence complained of." This is the doctrine declared in the cases of *Town of Elkhart v. Ritter*, 66 Ind. 136; *Car Co. v. Parker*, 100 Ind. 181 (s. c., note, 21 Am. & Eng. R. R. Cas. 514); *Turnpike Co. v. Andrews*, 102 Ind. 138; *Railway Co. v. Falvey*, *supra*. The case of *Brown v. Byroads*, 47 Ind. 435, cited by the appellant, decides nothing upon the point here in dispute. The case of *Teagarden v. Hetfield*, 11 Ind. 522, simply decides that a complaint praying damages for unlawfully killing a mare does not entitle the plaintiff to recover, in addition to

the value of the mare, compensation for taking care of two colts which were suckling the mare at the time she was killed. The pervading fallacy in the argument of appellant's counsel is that of undue assumption. He unduly assumes that the illness and permanent injury resulting from the tort are to be deemed special damages. On this point it is said, in a very late edition of an excellent text-book, that "there is a substantial uniformity of doctrine that every such subsequently developed disease which would naturally ensue from the injury, and which cannot be shown to have resulted from a sufficient independent cause, must be imputed to the author of the original injury. Though the plaintiff be afflicted with a disease or weakness which has a tendency to aggravate the injury, defendant's negligence will still be held to be the proximate cause; and the defence that the sufferer died from an independent disease is not made out, unless it is clearly shown that death must have ensued independent of the injury. Aggravation of an existing disease may be allowed for in the damages awarded." 2 Shear. & R. Neg. (4th Ed.) § 742. This is substantially the doctrine of the cases already referred to, and to them may be added the cases of *Jucker v. Railway Co.*, 52 Wis. 150; *Railway Co. v. Harris*, 122 U. S. 597; *Railway Co. v. Rosenzweig*, 113 Pa. St. 519; s. c., 26 Am. & Eng. R. R. Cas. 489; *Railway Co. v. Leslie*, 57 Tex. 83; s. c., 9 Am. & Eng. R. R. Cas. 407.

The court gave to the jury this instruction: "It is not enough that plaintiff may not have used ordinary care while on the defendant's platform, and while he was about to enter the defendant's cars (if such want of care is proved); but such want of care must have contributed to the injury, to bar the plaintiff from recovery, if his right to recover is otherwise shown by the evidence." If this instruction stood alone, it would not, we incline to think, warrant a reversal; for it is well settled that a plaintiff's negligence does not preclude a recovery unless it contributed to his injury. It is not mere negligence that bars a recovery, for the negligence must also be contributory. *Nave v. Flack*, 90 Ind. 205; *Railway Co. v. Richardson*, 66 Ind. 43-48; 1 Shear. & R. Neg. (4th Ed.) § 94; Whart. Neg. § 703; Cooley, Torts, 679; Beach, Contrib. Neg. § 3. But the instruction must be considered with others upon the same point, and, when thus considered, it is quite clear that the appellant has no just cause of complaint; for the other instructions clearly and explicitly directed the jury that the plaintiff could not recover unless he proved that he was not guilty of contributory negligence. In one of the instructions given, the court told the jury, among other things, that

Instruction as to contributory negligence.

the plaintiff was bound to prove, by a preponderance of the evidence, "that he was not guilty of any contributory negligence; that the injury complained of was received without his fault." The court did not err in instructing the jury that they might consider the occupation of the plaintiff, and that they might give him such a sum as would fully compensate him for the injuries he received. *Considering plaintiff's occupation.* *Railway Co. v. Falvey, supra; Turnpike Co. v. Andrews, supra; Car Co. v. Parker, 100 Ind. 181-195 (s. c., note, 21 Am. & Eng. R. R. Cas. 514); City v. Gaston, 58 Ind. 224.*

What we have said in disposing of the questions made upon the complaint, and the competency of evidence under it, disposes of the other questions made upon the instructions.

Judgment affirmed.

See cases cited from this series in the opinion.

HOUSTON AND TEXAS CENTRAL R. CO.

v.

LEE.

(*Texas Supreme Court, January 31, 1888.*)

Passenger—Personal Injuries—Negligence—Evidence—Sufficiency.—In an action to recover for personal injuries sustained by a passenger, testimony was introduced for plaintiff which tended to show that at the time the accident occurred the train was running at a high rate of speed, and that at the point where the cars were thrown from the track the ties were rotten and the road-bed in an unsafe condition. The defendant offered testimony in rebuttal, and also tending to show that nuts, bolts, and bars used to connect the rails had been drawn by some third person, but not to show by whom it was done. *Held*, that the evidence was sufficient to support a verdict for the plaintiff.

Same—Excessive Damages.—A verdict for \$6933 will not be set aside as excessive, when it appears that plaintiff was stunned in the accident, her ribs broken, and her spine injured; that she was under medical treatment for a long time; that she had not been able to resume her accustomed work; and that a uterine trouble had been produced.

ERROR to District Court, Brazos County.

Action by Miss Lizzie Lee against the Houston & Texas Central R. Co. for damages for personal injuries sustained by plaintiff while a passenger upon one of defendant's trains. There was a verdict for the plaintiff for \$6933, which the trial court

refused to set aside on a motion for a new trial. The defendant brings error.

O. T. Holt for plaintiff in error.

Spencer Ford for defendant in error.

GAINES, J.—This suit was brought in the court below by defendant in error against plaintiff in error to recover damages for personal injuries alleged to have accrued to her by the derailment of a coach upon the company's railroad upon which she was travelling as a passenger. The third and fifth are the only assignments of error relied upon in the brief of the plaintiff in error. Taking them in reverse order they are as follows: (5) "Because the verdict of the jury is contrary to the law and evidence in this, that all the evidence shows that the accident was caused by some malicious person removing the taps, nuts, bolts, and spikes from the rails, and that these acts and doings threw the train from the track." (3) "Because the verdict of the jury is grossly excessive in this: it was shown that immediately after the accident the plaintiff, Lizzie Lee, was attending parties and dances in the neighborhood in which she lived, and participated in all dances, and remained at some as late as one o'clock A. M."

Case stated—
Assignments
of error.

An outline of the evidence bearing upon the fifth assignment is as follows: The plaintiff proved that she was a passenger on the regular passenger train of the defendant company which went north from Houston on the night of the 13th of November, 1884, and that she had purchased a ticket; that just before reaching Clear Creek, about two miles south of Hempstead, six of the cars left the track, and that upon which she was travelling was thrown down the embankment, whereby she received serious personal injuries. Testimony was also introduced by her in chief, tending to show that at the time the accident occurred the train was running at a high rate of speed, and that at the point where the cars were thrown from the track the ties were rotten and the road-bed in unsafe condition. The defendant, on the other hand, introduced witnesses who swore that its road-bed at the place of the accident was in a safe condition; that the ties were sound and laid with first-class heavy steel rails; and that its employees in charge of the train were careful and competent men. Several witnesses, some of whom were employees and some passengers on the train, also testified that the train was not running dangerously fast. There was also evidence tending to show, by the time which had been consumed in running from Houston and intermediate stations to the place of the accident, that the rate of speed was but

Facts—Evi-
dence.

little, if any, in excess of schedule time of trains making that trip. The cars left the track on the right side, and the first rails which were displaced, counting from the south, were carried down the embankment by the rear wheels, and were found under them. The rail immediately in rear of the first that was detached remained in its place. The witnesses swore that there were no signs of violence upon it at the point of disconnection. There were nuts and bolts found near the joint, which bore no signs of having been torn asunder by force. An angle-plate was found down the embankment, which was not warped or bent, and had fresh rust upon one side of it. Defendant's witnesses also testified the spike-holes in the cross-ties, from which the rails were displaced, were not enlarged as they would have been had the spikes been wrenched out by the rail, but appeared as if the spikes had been drawn by a claw-bar. It was also testified that spikes were found there which had the marks of this implement upon them. The section foreman testified that shortly after he got to the wreck with his hand-car, which was within an hour or two after the accident, he went to it for his claw-bar and wrench, and that they were missing. He also swore that he left them on the car at the section house one and a quarter miles distant the evening before, and that they had never been seen by him. He was corroborated as to these matters by one of his section men. In rebuttal plaintiff introduced witnesses who testified that at and before the accident the cars were running at a very high rate of speed, so much so as to cause remarks among the passengers and to greatly alarm at least one of them. Other witnesses swore that many of the cross-ties where the cars left the track were rotten, and though they attempted to make a fire with them they would not burn. It was also testified that spikes were pulled from the cross-ties with the hand; and one witness swore that he forced a spike into a tie with his hand alone to the depth of three or four inches. As to the condition of the ties and rate of speed a large number of witnesses were examined on both sides, and their evidence was very conflicting. Upon the other points there was no important conflict in the evidence. It is sufficient to say, however, that notwithstanding the conflict there was ample testimony to sustain the verdict of the jury upon the questions of the safety of the road-bed and the rate of speed; and the verdict cannot be set aside, unless the defendant has shown that the accident was caused by the malicious act of some third person. It must be conceded that upon this point it has made a strong case. If the nuts, bolts, and bars were those used to connect the rails where they were detached, it is difficult to account for their appearance upon

any other hypothesis, except that they were removed by direct human agency. But that they were the same irons used to secure the joint may be doubted. The defendant failed to show satisfactorily, any motive on part of any person to do the act. Such outrages are sometimes perpetrated, but their recurrence is so rare as not to be presumed from any doubtful circumstances. Upon this point the defendant company had no direct evidence whatever. No one was seen to remove the bolts or spikes or was known to be about the place at the time it is claimed that the joint was disconnected. It is not necessary for us to say what our conclusion would be as to the facts if called to pass upon them in the first instance. Where there is not sufficient evidence to sustain a verdict, this court will reverse the judgment; but if there be sufficient evidence, we cannot interfere merely because we think the weight of the opposing testimony is against it. It is only when the verdict appears clearly wrong that this court can set it aside upon the sole ground that it is against the weight of the evidence. The verdict in this case is not clearly wrong; and therefore the fifth assignment of error is not well taken.

Verdict sustained by the evidence.

We are also of the opinion that the damages are not excessive. It is true that some four months after the accident the plaintiff attended parties and danced, but she testified that she found, after two or three experiments in this way, she suffered so much in consequence that she had been compelled to desist altogether. There was evidence to show that when the car was hurled down the embankment she was stunned and rendered unconscious, and that her ribs were broken and spine injured. She was under medical treatment for many weeks, and though she has been able to go about she has never been restored to health. Before her injuries she assisted her father in the field picking cotton and hoeing, and did housework and washing. Since she had been able to do no work. There was evidence tending to show that she was injured internally and that a uterine trouble was produced. It was shown that she suffered at intervals of about six weeks pains resembling those of childbirth, and that at such times her limbs became swollen. These attacks had continued to return until the time of the trial. The company sent a physician in their employment to examine into her injuries. She answered freely all his questions, and submitted to a personal examination as far as modesty would permit. He was placed upon the stand by defendant, but was not examined concerning the extent of her injuries. When asked his opinion out of court by counsel for the plaintiff, he declined

Damages not excessive.

to answer their questions, It was the peculiar province of the jury to assess the damage, and such being the evidence we cannot say that a verdict for \$6933 was excessive. We find no error in the judgment, and it is affirmed.

Excessive Damages for Personal Injuries.—See, generally, note 33, Am. & Eng. R. R. Cas., 520; Louisville, etc., R. Co. v. Thompson, 30 Ib. 541; note, 543; Missouri, etc., R. Co. v. Mackey, 22 Ib. 306; Memphis, etc., R. Co. v. Stringfellow, 21 Ib. 374; Tierney v. Minneapolis, etc., R. Co., 21 Ib. 545; Kan. Pac. R. Co. v. Peavy, 11 Ib. 260; Klutts v. St. Louis, etc., R. Co., 11 Ib. 639; Funston v. Chicago, etc., R. Co., 14 Ib. 640; Atchison, etc., R. Co. v. Moore, 15 Ib. 312; Knowlton v. Milwaukee City R. Co., 16 Ib. 330; Sioux City, etc., R. Co. v. Finlayson, 18 Ib. 68; Ferguson v. Wisconsin Cent. R. Co., 19 Ib. 285; Berg v. Chicago, etc., R. Co., 2 Ib. 70; Delie v. Chicago, etc., R. Co., 5 Ib. 464; Houston & T. C. R. Co. v. Shafer, 6 Ib. 421.

SMITH

v.

CENTRAL RAILROAD AND BANKING CO.

(Georgia Supreme Court, April 9, 1888.)

Passenger—Personal Injuries—Alighting—Dangerous Place.—In an action against a railroad company for damages for personal injuries it appeared that plaintiff was a passenger on a freight train which arrived at its destination about midnight; that plaintiff was told to leave the train, and followed the brakeman; that the track upon which the train stopped was within four feet of the edge of a retaining wall about twenty feet high; that in following the brakeman plaintiff stepped over the wall which was unprotected, and was injured. No light was furnished to plaintiff, and he received no warning of his proximity to the wall. *Held*, that the evidence was sufficient to justify a verdict for the plaintiff.

Same—Instruction—Duty of Company.—The only question before the jury being whether the defendant was negligent in stopping the car near the wall and leaving the plaintiff without a light and without notice of the dangerous character of the place, the jury were properly instructed that when the defendant brought the passenger to the place where the train was going, all it was bound to do then was to see that he was afforded reasonable immunity from danger, and reasonable protection in getting away from the point where he had been landed.

Same—Instruction—Illustration.—In such action an instruction by way of illustration that if a railroad stopped its train upon a trestle over a river in the day time and told the passenger that he must get off, that that was as far as the train would go, and that if the passenger stepped out and stepped into the river the company would not be liable; but that if the train stopped at the same place on a dark night, and the passenger was told to get out, without being notified that they were on a trestle and over a river, and he stepped off and was injured in consequence, the rail-

road company would be liable, is appropriate to the case, and correct in law.

Same—Place for Alighting—Duty of Company.—In a case in which the complaint is that the car was stopped near a dangerous precipice, without a light, and without notice to the plaintiff of its dangerous proximity, an instruction that the company is not bound to make landings or any provision for the reception and discharge of passengers where none are expected to be ought not to be given without modification to adapt it to the circumstances of the case.

Same—Freight Trains.—If a railroad company carries passengers for hire upon its freight trains, it is responsible for injuries caused by setting them down in dangerous places on dark nights, and without notice of the danger.

Same—Evidence—Competency.—Evidence that another person had fallen over the same place as plaintiff, although improperly admitted, will not be sufficient to justify a reversal when the finding of the jury would not be affected in any way if it were taken out of the case entirely.

ERROR to the City Court of Savannah.

Action to recover damages for personal injuries alleged to have been caused through the defendant's negligence. The defendant brings error to review a judgment overruling a motion refusing a new trial. The case was formerly before the supreme court, on a writ of error and remanded for a new trial. See 76 Ga. 209. The present writ of error brings up the proceedings at the second trial for review.

Lawton & Cunningham for plaintiff in error.

J. R. Saussy for defendant in error.

SIMMONS, J.—Smith brought suit against the Central Railroad & Banking Co. for damages, wherein he alleged that he made a contract with the defendant whereby it agreed to carry him safely, for a certain sum of money, from station No. 6 on its road to the city Facta. of Savannah, on a freight train, and that, upon arriving at his destination, the train was stopped so that the car upon which he was riding was carelessly and negligently placed in close proximity to a dangerous and exposed pitfall or retaining wall, in the dark, and without a light; that this wall was 20 feet high from the ground, and without any railing thereon to serve as a guide or protection; that no light was furnished, and no notice given of the existence of the wall, or his proximity thereto; and that, in attempting to make his way from the car to the passenger depot of the defendant, he fell over the wall, and was in consequence greatly injured. Upon the trial of the case, the jury returned a verdict in his favor. The defendant made a motion for a new trial; which motion was overruled by the court, and the defendant brings the judgment overruling said motion to this court for review. The first three grounds of the motion are the usual ones,—

that the verdict is contrary to law, to the evidence, and against the weight of evidence. The fourth ground is that the verdict is excessive. The fifth, sixth, and seventh grounds complain of the charge of the court as given. The eighth ground excepts to the admission of the testimony of James Watts.

1. We have carefully considered the evidence as disclosed by the record in this case, and we think it authorizes the verdict of the jury. It shows, in brief, that the plaintiff in the court below was a passenger on a freight train of the defendant, and was carried thereon from station No. 6 to the city of Savannah, where the train arrived between 11 and 12 o'clock on a dark night; and that the conductor left him in the car, without notifying him of his arrival, and took with him the only lantern that was on the train. Along-side the track at this point, and some three or three and a half feet from it, was a wall, the height of which on the side next the track was from five to eight inches from the ground, but on the outer side was from fifteen to twenty feet high from the ground; this difference being caused by the banking up of the dirt on the one side, for the purpose of making a road-bed for the track. The plaintiff was told, at this point, by one of the train hands, to leave the cab; but no light was furnished him, and no notice given him of his proximity to the wall. One of the employees connected with the train took his luggage, and proposed to guide him to the depot; and, in following this guide, his feet repeatedly struck against what he took to be the ends of the cross-ties, and to avoid them he made two steps to the right, and upon making the second step fell from the top of the wall to the ground on the other side, a distance of perhaps 20 feet, and was badly injured, receiving a shock to his nervous system which confined him to his bed for some weeks, and incapacitated him from business for months, during which time he suffered great pain, physically and mentally, as well as other damage to his person, the character of which is more fully set out elsewhere in the report of this case. These, in substance, were the facts before the jury on the trial of the case which we are now reviewing. If they are true (and the jury by their verdict have so found them), we think that they authorize the verdict; that the verdict was not against the weight of the evidence, nor contrary to law, as claimed by the plaintiff in error; nor was it so grossly excessive as to authorize this court, under the facts above recited, to reverse the judgment of the court below in refusing to grant a new trial upon that ground.

It is contended, however, by counsel for the plaintiff in

Setting passenger down at dangerous place—Verdict sustained by the evidence.

error, that this court, when the case was here before (76 Ga. 203), decided, upon the same state of facts, that "a verdict in favor of the plaintiff for \$10,000 is not only flagrantly extravagant, but so excessive as to disclose either bias in his favor, or prejudice against the defendant;" and counsel contend that this court in the present case is bound by that decision, the facts being the same. We have compared the facts as reported in 76 Ga. and the facts as disclosed by the record in the case now before us, and upon the only question decided by this court before, namely, as to contributory negligence, we think the facts are now very different. The evidence, as stated in the report of the former case, showed that the cab was stopped on the second track from the wall, which would place Smith 12 or 15 feet from the wall; and hence, in order for him to have fallen over the wall, in the distance which it was said he walked, it would have been necessary for him to go at right angles from the cab, instead of following his guide. The evidence in the present case, however, shows that the cab was stopped on the track nearest the wall, and that the path between the track and the wall was only three to three and a half feet wide; so that to step over the wall as he did would only require a divergence to the right of about two steps, as Smith claimed it to be in his testimony. Again, the statement of the facts as they appear in Judge Hall's opinion in the former case shows that the wall was two feet high from the ground on the side next the railroad; whereas the record of the present case shows that the height was from five to eight inches. On the former trial, "Allen's bougie" was mentioned as having been used by the plaintiff; and Judge Hall, in his opinion, very naturally concluded that it was an instrument, and that the plaintiff had injured himself by its use, as was contended by the defendant. In this case it is explained that "Allen's bougie" was not an instrument, but was a medicine, and that the plaintiff was not injured by its use. On the former trial, the evidence was that the plaintiff had not recovered from an attack of venereal disease, and that the loss of his testicle and other damage complained of might have resulted from this cause, instead of from his fall. In the present case it was proven beyond all doubt, by his attending physician, that he had fully recovered from that disease some months before he was injured by this fall, and that the disease could not possibly have contributed to the loss of his testicle. Other differences might be shown, if it were necessary, between the testimony as reported in 76 Ga. and the testimony as it is now before us; but we think that the differences we have alluded to are sufficient to show that the case as presented to the court when it was

here before is not the case which we are now considering. If it were true that Smith alighted from the car at a distance of twelve or fifteen feet from the wall, as shown in the report of the first trial, and that the wall was two feet high; and if it were true that the *bougie* referred to was an instrument, instead of a medicine, and that he had not recovered from the venereal disease,—then the court was right in holding, as it did in 76 Ga., that, if the defendant was guilty of any negligence at all, it was slight, and that the negligence of the plaintiff appeared to have been greater than that of the defendant. But we have shown that these are not the facts in the case we are now reviewing. The facts before us show, on the contrary, that the negligence of the plaintiff was slight, and that of the defendant greater. Viewed in the light of the facts now before us, the verdict does not strike us as being excessive, as it did the court on the first trial. In view of the facts disclosed by this record, we do not think this verdict is so excessive as to show bias or prejudice against the defendant.

2. The fifth ground excepts to a part of the charge of the court set out therein, as will be seen from the report of this case. We do not think that the dissertation of the

Instruction as to duty of carrier in regard to passenger trains.

judge upon the rules governing common carriers in regard to passenger trains, and the duties they owe to passengers in taking them upon their trains, and transporting them, and in letting them off the trains, threw any light upon the subject which the jury were then investigating, but we cannot see wherein the defendant was injured thereby. It simply informed the jury that a passenger on a passenger train was entitled to more rights and comforts than a passenger on a freight train; and, whether this charge stated the law as to passengers correctly or incorrectly, it could not possibly mislead any juror of ordinary intelligence.

3. The only question before the jury was whether the defendant was negligent in stopping the cab near this wall, and leaving the plaintiff without a light, and without notice of

Same—Landing passengers.

the dangerous character of the place. And on this subject we think the court instructed the jury properly when he charged "that, when the defendant brought the passenger to the place where the train was going, all it was bound to do then was to see that he was afforded reasonable immunity from danger, and reasonable protection in getting away from the point where he had been landed."

4. The sixth ground of the motion complains as to the illustrations given by the judge in charging the jury upon the

duties of railroads to passengers. The illustrations given by the judge tended to show what kind of care must be exercised by the railroad under different circumstances. The first illustration was that if a railroad stopped its train upon a trestle over a river in the day-time, and told the passenger that he must get off, that that was as far as the train would go, and if the passenger stepped out, and stepped into the river, the railroad would not be liable; but that if the train stopped at the same place on a dark night, and the passenger was told to get out, without being notified that they were on a trestle and over a river, and he stepped off, and was injured in consequence, the railroad company would be liable. We do not see why this is not sound law, and an apt illustration of the ideas intended to be conveyed by the judge. My own experience instructing juries on the circuit bench is that jurors will more frequently comprehend an idea given in the way of illustration than they will when simply given as an abstract principle of law. At any rate, we do not see how the defendant was damaged by this illustration, especially as the judge told them it did not apply to this case.

Illustration
given in in-
structions.

5. The seventh ground complains that the judge modified the requests of the defendant. We do not think that the court erred in adding to or modifying the requests to charge as complained of. The defendant requested the court to charge an abstract principle taken from the syllabus of this case in 76 Ga. 209, which was, in substance, that the road is not bound to make landings or any provision for the reception and discharge of passengers where none are expected to be. The complaint in this case is not that the plaintiff did not have proper facilities for getting on and off the car, but that the car was stopped near a dangerous precipice, without a light, and without notice to the plaintiff of its dangerous proximity.

Place for
alighting—
Duty of com-
pany.

6. And we think the court was right in instructing the jury that, under such circumstances, the company was bound to exercise reasonable care and diligence with reference to permitting the passenger to leave the train where they put him down. Railroad companies are not bound to take passengers on their freight trains; but we think that when they do take them, and receive their money, they must not set them down in dangerous places on dark nights, without light, and without notice of the danger.

Same—Freight
trains.

7. The eighth ground complains of the admission of Watts' testimony that he had fallen off the wall where the plaintiff was injured. It is doubtful if this evidence was admissible,

unless the testimony went further, and showed that some responsible officer of the company had notice of the fall; and it would perhaps only would have been admissible then to show, not that Watts fell and hurt himself, but that it was a dangerous place, and that the company had notice of it. But as there is no doubt from the evidence that it was a dangerous place in the night-time, being 20 feet high, and without a railing or guard on the top of it, and as the company ought to have known of its dangerous character from the fact it had been there so long, we do not think the admission of Watts' testimony is sufficient to work a reversal in this case. If it were taken out of the case entirely, we do not see that the finding of the jury would be affected one way or the other. Judgment affirmed.

Setting Passengers Down at Dangerous Places.—See *Eckerd v. Chicago etc., R. Co.*, 27 Am. & Eng. R. R. Cas., 114, note, 115; note, 26 Ib. 233; *Cartwright v. Chicago, etc., R. Co.*, 16 Ib. 321.

WINNEGAR'S ADM'R

v.

CENTRAL PASSENGER R. CO.

(*Kentucky Court of Appeals.*)

Passengers—Wilful Assault—Survival of Action—Kentucky Statute.—In Kentucky no cause of action survives to the administrator for a wilful assault upon his intestate by the driver of a street car which caused injuries resulting in his death, the statute of the State making railway and other corporations liable only when death ensues by reason of the wilful neglect of the agents or servants of the corporations; but the administrator may sue the company for a violation of the obligation on the part of the company to carry the intestate while on the cars, safely to his destination, and to protect and care for him while so travelling.

Same—Right of Action—Scope of Employment.—A carrier is bound to protect passengers from insults and wanton interference of strangers, fellow-passengers, and the servants engaged in the transportation, and a street car company is liable to a passenger for a wilful assault upon him by the driver of the car.

APPEAL from the Court of Common Pleas, Jefferson County.
Action by the administrator of the estate of William Winnegar, deceased, against the Central Passenger R. Co. to recover damages for injuries to plaintiff's intestate, caused by a wilful assault upon him by the driver of a street car upon which he was a passenger. The opinion states the case.

PRYOR, C.J.—A demurrer was sustained to the petition in the court below, and the plaintiff, declining to amend, has brought the case to this court, insisting that the facts alleged constitute a cause of action. The plaintiff is the administrator of William Winnegar, and the defendant is the Central Passenger R. Co. At the time of the injury complained of, the defendant was a common carrier of passengers in the city of Louisville, running and operating its street cars, through its employees, upon and between certain designated streets within the city, and the appellant's intestate boarded the cars of the defendant for the purpose of going from Fifteenth to Eighteenth Street, on Walnut. It is alleged that his intestate tendered to the employee of the company, who was the driver, the ordinary fare, which was five cents, when the latter refused to receive it, and assaulted and struck his intestate, knocking him off the car on the ground, where he was run over or struck by the car that the employee was then driving, and badly injured, suffering great bodily pain and mental anguish from the fourteenth of June, 1885, continuously, until the twenty-sixth of the same month, at which time his intestate died by reason alone of said injuries; that the driver was at the time in the employ of the defendant, and running the cars for the transportation of passengers, by its authority, and unlawfully, and while acting in the course of his employment, inflicted the alleged injuries on the intestate. The plaintiff, as his administrator, sues, therefore, to recover the damages caused by said injury, resulting in the physical and mental pain as before alleged, from the date of the injury up to the death of the intestate. He prays judgment, etc.

The facts stated are, in substance, those set forth in the petition.

The court below seems to have regarded the action by the personal representative as an action for damages by reason of the death of the intestate, and, if so, the demurrer was properly sustained. If the recovery is sought for the death of the intestate, the latter having no cause of action therefor against the company, none could survive to his administrator, as injuries affecting life were not the subject of a civil action at common law. Our statutes have enlarged the common-law rule, by making railroad companies and other corporations liable when death ensues to one by reason of the wilful neglect of the agents or servants of the corporation, and, when the party killed is not in the employ of the corporation, an action may be maintained for a less degree of neglect than either gross or wilful neglect. No question can arise under the

Facts.

Survival of action for wilful assault—Kentucky statute.

statute in this case, as it is not alleged that the intestate lost his life or was injured by the negligence of the employee of the company, but, on the contrary, it is averred that the injury was wilfully and intentionally inflicted; and in such a state of case, as was decided by this court in *Spring's Adm'r v. Glenn*, 12 Bush, 172, and *Morgan v. Thompson*, 82 Ky. 383, no action can be maintained, under the statute, by the personal representative for the destruction of his intestate's life. An intentional injury, as was said in those cases, cannot be said to have been the result of negligence, nor can an action be maintained for the taking of human life intentionally by the personal representative, on common-law principles. The statute of this State, with reference to causes of action which survive, provides: "No right of action for personal injury, or injury to personal or real estate, shall cease or die with the person injuring, or the person injured, except actions for assault and battery, slander, criminal conversations, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but, for any injury other than those excepted, an action may be brought or revived by or against the personal representative," etc. Chapter 10, Gen. St. 179.

The intestate might have instituted an action of assault and battery against the driver, prior to his death, but, dying before trial, the action under the statute would not survive to his administrator; but if he had sued the present appellee, alleging its existence as a carrier of passengers for hire, and that it had undertaken for a fixed sum to transport him as a passenger from one part of the city to the other, but, in violation of its contract and its obligations to him as a passenger, the driver had thrown him from the cars, it cannot be said that such an action would die with the injured party, but, on the contrary, it would survive to the administrator, and, if so, the administrator can maintain this action. The action is not for the loss of life, but for a personal injury growing out of the violation of the obligation on the part of the appellee to carry the intestate, while on the cars, to his place of destination, when paid or offered to be paid the regular fare.

The general doctrine with reference to master and servant, employer and employee, is that, when the employee committing the inquiry is not at the time executing the employer's business, or not acting within the scope of his employment, the employer is not responsible. If one driving the cars for the corporation should leave the car, and beat or abuse one on the sidewalk, the company would not be responsible. Such an assault could not be said to have been authorized by the company, or a part of the driver's employment, nor can it be

Liability of
carrier for as-
sault by ser-
vant.

said that it was done in the course of the employment. In this case the appellant's intestate had entered the appellee's car, tendered his fare, and placed himself under the care and protection of the driver, to be carried as a passenger from one part of the city to another. It then became the duty of the driver to accept the fare, and to carry the intestate from the one street to the other, without offering him personal violence, unless necessary for his own protection, the preservation of order in the car, or the safety of the other passengers. It is a matter of contract, with obligation assumed by the carrier to protect and care for the passengers on his train. Whether that contract is violated wilfully and intentionally, or through ignorance on the part of the driver, is immaterial. It is the duty of the carrier to provide competent and careful drivers, that its passengers may be transported without fear or molestation from either the driver or others in the car, if in the power of the driver to prevent it, unless the conduct of the passenger requires violence to be used towards him.

The doctrine is now well established "that the law implies a contract for the protection of the party carried from the insults and wanton interference of strangers, fellow-passengers, and the carrier and his servants, and, for every violation of the implied contract by force or negligence, the carrier is liable in an action of contract or tort." 1 Add. Torts, 33, note, and authorities there cited. The law makes the carrier responsible for the acts of those who are placed in charge of the car, and who for the time have the voluntary custody of the passenger, with the implied obligation that he will exercise the highest degree of diligence to transport him safely.

In *Goddard v. Grand Trunk Railway*, 57 Me. 202, it was held that the carrier was obliged to protect his passenger from violence or insult, from whatever source it arises. He must use all such reasonable precautions as are necessary for that purpose.

In *Railroad Co. v. Finney*, 10 Wis. 388, it was held that, where the misconduct of the agent causes a breach of the principal's contract, he will be liable whether such conduct be wilful, or merely negligent.

In the case of *Sherley v. Billings*, a carefully considered case by this court, reported in 8 Bush, 147, it was said "that every one who commits his person to the custody and control of others has the right to expect from them the highest practicable degree of care and skill." In that case a boy about 15 years of age was assaulted by an officer of the boat, and severely injured. The suit was against Sherley and others, the owners, to recover damages for the injuries sustained. It was urged then, as in this case, that the wrong

was not done by any authority from the owners, or in the discharge of any duty imposed upon the agent arising from the terms of his employment; that it was the wilful and unauthorized tort of the officer on the boat; but this court held that the compensation the carrier received from the passenger is not only in consideration that it will transport him from one point to another, as may be agreed on, but further that, during the time he is so transporting him, reasonable diligence will be used to protect the passenger from insult and injury; and, again: "If the officer fail to use reasonable diligence in the protection of the passenger from injuries at the hands of strangers or other passengers, the contract is violated, and the carrier can be made to respond in damages."

Here the agent in charge of the car committed the wrong, and, if the statements contained in the petition are true, and they must be so regarded on demurrer, the tort was of a most aggravated character, and in palpable violation of the duties incumbent on the carrier by reason of its relation to the passenger arising from the implied contract. The moment the appellant's intestate entered the car, and tendered his fare, he became a passenger, and was entitled to be carried to his destination: that is, from the one street to the other. It is argued, however, that in the case of *Sherley v. Billings*, the boy injured had himself instituted the action, and obtained a recovery, while in this case the personal representative is seeking to recover for the death of his intestate the loss sustained by his death. Such is not the object of the petition, and the fallacy of the argument consists in the assumption that this is an action for an assault resulting in the death of the injured man. It is not to recover for the death, nor is it an action of assault and battery, but an action in the nature of an action on the case for the injuries resulting from a breach of appellee's contract. The relation the parties occupy, the one to the other, is from the contract, and the failure to discharge the duty imposed by it may be a tort; but nevertheless it springs from the contract, and the action survives to the administrator. Cooley on Torts gives the case of the carrier as an illustration of the rule. "The law," says Mr. Cooley, "requires the carrier to transport with partiality and safety those who offer. If he fails to do so, he is chargeable with a tort." Cooley, Torts, 91.

It is not material whether the violation consists in putting the passenger off at a point before his destination is reached, or by insulting him, or in assaulting him. They are all plain violations of duty, for which a recovery may be had. In this case the administrator is claiming to recover damages for the physical and mental agony from the commission of the wrong

up to his death. This is the distinct claim made in the petition, and we perceive no reason why a recovery should not be had, if the case is made out. The fact that the injury finally resulted in the death of the intestate did not destroy the right of action on the contract, or for the tort growing out of it; for without the contract no liability would exist against the company. If Billings had died, in the case against Sherley, the action would have survived, and a recovery been permitted, for his mental and bodily suffering previous to his death. It is true it is said in the opinion that Billings was assaulted, but it is further said that the assault was a violation of the contract between the carrier and the passenger, and for that reason the recovery below was affirmed by this court. At common law, torts to the person survived when the action could be framed in form *ex contractu*.

In the case of Hansford's Adm'r *v.* Payne, reported in 11 Bush, 380, the nature, in regard to the character of actions that survived, was considered, and there held that, although the statements of the petition were not sufficient to authorize a recovery for the death by reason of wilful neglect under the statute, still the administrator was entitled to recover for the suffering and mental agony of the intestate caused by taking the poison from the time it was administered up to his death. In our opinion, the facts alleged present a cause of action, and the judgment below is therefore reversed, with directions to overrule the demurrer, and for further proceeding consistent with this opinion.

Liability of Carrier for Assaults by Servants Upon Passengers.—See *Fick v. Chicago & N. W. R. Co.*, *ante* 378, and note, 380—382.

WHITE WATER VALLEY R. CO.

v.

BUTLER.

(*Indiana Supreme Court, December 29, 1887.*)

Passenger—Freight Train—Stopping Place—Duty of Company.—If a railroad company carries passengers upon a freight train, and makes no distinction between that train and a train used exclusively for the carriage of passengers, it is bound to set passengers down at the regular passenger stations, and a passenger who is carried past his destination without an opportunity to alight, and ejected at a place which is not a regular station has a cause of action against the company.

APPEAL from Circuit Court, Rush County.

Action by Mary J. Butler to recover damages for failure to stop at a regular railroad station to allow plaintiff to alight. Defendant appeals from a judgment for plaintiff. The facts are stated in the opinion.

ELLIOTT, J.—There is evidence in proof of these facts: The appellee bought a ticket entitling her to be carried as a passenger from Brookville to Metamora over the
Facts. appellant's railroad. She took passage in a train which carried both freight and passengers, and which, under the rules of the company, stopped at Metamora to receive and discharge passengers. At that place there was a depot at which passengers were received and discharged, and at which the trains usually stopped for that purpose. The train which the appellee entered did not stop at the depot, but did stop on a switch or side track and remained there long enough to allow another train to pass. The name of the station was not called, nor was any intimation given to passengers to alight. The train drew out from the switch, moved on past the depot, and, when it had gone about one half mile beyond Metamora, the appellee was ejected.

These facts entitled the appellee to a recovery. It was the duty of the carrier to stop at the depot where pas-
Passenger must be put down at regular station. sengers were usually received and discharged. A right to be carried from one regular station to another includes the right to a safe alighting-place at the depot of the carrier, kept and used for that purpose. A person buying a ticket entitling him to passage to a town or city cannot be required to alight at any part of the town or city it may please the carrier to stop, but he is entitled to be carried to the regular depot of the carrier. The carrier's duty is not discharged when an opportunity is offered the passenger to alight alongside of a switch or side track distant from the usual and regular alighting-place. A text-writer thus states the rule: "The passenger must not only be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping; and in an old case it was held that, when such usual place of stopping was an inn yard it was not sufficient to put him down outside of the gateway of the inn." Hutch. Carr. § 612. The authorities fully support the author's statement of the law. *Terre Haute & I. R. R. Co. v. Buck*, 96 Ind, 346; s. c., 18 Am. & Eng. R. R. Cas. 234.

It is probably true that a railroad company may make

a distinction between trains employed exclusively in transporting passengers and those employed in carrying both freight and passengers, and require passengers on the latter trains to alight at a safe place other than the regular depot; but, unless a distinction is made, the passenger has a right to be carried to the regular depot. We decide this case, as the evidence fully warrants us in doing, upon the theory that no distinction was made between the two kinds of trains, and, proceeding on that theory, adjudge that it was the appellant's duty to stop at the regular depot a sufficient length of time to allow the appellee to alight in safety.

No distinction between passenger and freight trains.

Judgment affirmed.

COVINGTON

v.

WESTERN AND ATLANTIC R. Co.

(*Georgia Supreme Court, May 11, 1888.*)

Passenger — Alighting — Excitement — Contributory Negligence — Instructions.—An instruction requested by plaintiff in an action to recover for injuries sustained in alighting from a train, that the jury may take into consideration the excitement under which the act was done is properly refused if no evidence is offered to show that plaintiff acted under excitement, and the petition contains no allegation thereof.

Same — Failure to Stop — Province of Jury.—An instruction that if the company failed to stop the train for a time reasonably sufficient to allow plaintiff, a passenger, to get off, and if plaintiff of his own motion jumped off when the train had attained a speed which rendered his act unsafe and was injured, he cannot recover, is erroneous, the question whether plaintiff's act, under such circumstances was negligent, being a question for the jury.

ERROR to Superior Court, Gordon County.

Action to recover damages for personal injuries. Plaintiff brings error to review a judgment for defendant. The opinion states the case.

T. C. Milner and *J. M. Neil* for plaintiff in error.

McCutchen & Shumate, R. A. J. McCamy and *O. N. Star* for defendant in error.

BLANDFORD, J.—The injury to the plaintiff is alleged to have resulted from the failure of the defendant to stop the

train at the station a sufficient time to allow him to alight from it with safety.

1. The first ground of the amended motion for a new trial is that the court refused to give the following charge as requested: "The law allows you to take account of the excitement under which an act is done, even where the party is not menaced with bodily harm, if the circumstances are such as naturally to produce excitement in a prudent person." We cannot say that this is not good law in the abstract, but

Consideration
by jury of ex-
citement un-
der which act
was done—In-
struction.

we do not think it is strictly applicable to the facts of this case. The plaintiff, who testified as a witness, did not testify as to any excitement he was under at the time he jumped from the train; nor does the declaration state anything in reference thereto. Hence we cannot say that the court committed such an error in refusing to give this charge as would warrant us in reversing the judgment of the court below. The second ground is that the court refused to charge "that if, by defendant's negligence, plaintiff was placed in the midst of circumstances calculated to excite and throw a man of ordinary prudence off his guard, and there was a sudden necessity for him to decide, without time for reflection, then his failure to act with perfect calmness and self-possession might not render him culpably negligent or wanting in ordinary care, even though he acted more unwisely than a man of ordinary prudence, perfectly cool and self-possessed, would have acted; that the law allows the jury to take account of the excitement under which an act is done, even where the party is not menaced with bodily hurt, if the circumstances are such as naturally to produce excitement in a prudent person." What we have said in reference to the preceding ground will apply also to this ground of the motion. While, in a proper case made, this would be a proper charge for the jury, we do not think that the refusal of the court to give it in charge in this case is such error as to demand a reversal.

2. The last ground of the motion is that the court charged: "If defendant's agents were guilty of negligence in failing to stop the train a reasonably sufficient time to allow plaintiff to get off, and after the train was in motion at a speed which made it unsafe for plaintiff to jump off in the dark, and, under the circumstances, if plaintiff, of his own motion, jumped off the train, and was thus injured, then he could not recover." We think this charge was error. It took from the consideration of the jury the question of whether the jumping from the train, under such circumstances, was an act of

Negligence in
jumping off
train in mo-
tion—Question
for jury.

negligence or of ordinary care and diligence. That was a question for the jury, and not for the court. See *Railroad Co. v. Mozely*, 4 S. E. Rep. 324 (decided at the last term of this court), where a similar charge was held to be error. We have repeatedly decided that the question of what is or is not negligence, in cases of this sort, is exclusively for the jury. It is a mixed question of law and fact, which the jury must settle for itself.

3. If this case had been tried upon a right theory, I do not know that we would grant a new trial even upon this ground, under the facts of the case. But it appears to us that the case was not tried upon the true theory. Case not tried upon right theory. The main question in this case is whether the railroad company stopped its train a reasonably sufficient time to allow the plaintiff to depart from the train in safety. If it did, and he jumped off the train after it was again in motion, he cannot recover. If it did not stop a sufficient time, and if in attempting to get off he was guilty of no negligence, or not such negligence as to bar his right to recover, then he would be entitled to such damages as he may have sustained. That is the only question that need have been submitted to the jury by the court. As to the fact of whether the train stopped a sufficient time, the witnesses for the plaintiff and the defendant differed. The employees of the railroad testified that the train stopped several minutes, and that the time was sufficient. Some of the passengers testified that it stopped about a minute. The court should have left to the jury for their determination the question of whether the time was sufficient or not. If the time was sufficient, he could not recover. If the time was not sufficient, and he attempted to alight after the train started, and was not guilty of such negligence in so doing as would bar his right to recover, he could recover. Or it may be that he contributed in some measure to the injury, and that is a question for the jury. If there was contributory negligence on his part, the jury could set off against the negligence of the defendant, and award the damages accordingly.

While we do not feel inclined to reverse the judgment (for it appears to us that the verdict is sustained by the evidence), yet we feel constrained to do so, under the facts of this case. Judgment reversed.

Jumping From Moving Trains.—See generally *Hemmingway v. Chicago*, etc., R. Co., 33 Am. & Eng. R. R. Cas. 511; note, 518; *Roben v. Central Iowa R. Co.*, and note, 31 Ib. 45, 50; *Pennsylvania R. Co. v. Peters*, and note, 30 Ib. 607-612; *Harmon v. Washington & G. R. Co.*, 30 Ib. 627, where the cases are collected.

WOODWARD

v.

WEST SIDE STREET R. CO.

(Wisconsin Supreme Court, May 5, 1888.)

Passenger—Boarding Street Car—Condition of Tracks—Instructions.—Plaintiff signaled a street-car, and attempted to enter it while moving, the driver having failed to observe his signal. Plaintiff fell, his hand caught in the rail, and he was dragged some distance before the car was stopped. Several witnesses testified that the driver was careless, did not set the brakes, pull up the horses, or attempt to stop the car in any way, and that it was only stopped by two persons running in front of the car and holding up their hands. The driver testified that as soon as the bell was rung by passengers inside he set the brakes, but that the wheels slid on account of the slippery condition of the track. Witnesses testified on behalf of the company that the place where the accident occurred was on the down grade, and that in winter when the tracks were slippery the cars would slide down it, although the brakes were set and the horses held back. *Held*, that an instruction to the effect that the jury must take it as an established fact that in the winter season cars would slide at the place in question, though the brakes were firmly set, and for a time beyond the control of the driver, was erroneous, and that it ought to have been left to the jury to say whether the driver exercised due diligence in attempting to stop the car, and whether, in fact, it did slide after the brakes were set owing to the condition of the track.

Same—Boarding Moving Car—Liability of Company.—Even if a person be guilty of negligence in attempting to get on a street car while it is in motion, if the driver was notified that such person had fallen, and was being dragged at the tail end of the car, and could have avoided injury by the exercise of reasonable care in stopping it, the company is liable.

APPEAL from Circuit Court, Milwaukee County.

Action to recover damages for personal injuries. Plaintiff appeals from a judgment for defendant. The opinion states the case.

Harlow Pease for appellant.

Jenkins, Winkler & Smith for respondent.

TAYLOR, J.—The appellant brought this action against the respondent to recover damages for an injury received by him under the following circumstances: On the 9th day of February, 1885, the appellant was at the office of E. D. Holton, at No. 613 Grand avenue, in the city of Milwaukee. At about 10:30 A.M. on that day he left said office, which is on the south side of said avenue, and about

Facts.

the middle of the block between Seventh and Sixth streets, which cross said avenue, running north and south, for the purpose of taking the street car going east on the avenue. Mr. James Holton accompanied the appellant from the office to see him off. The appellant and Mr. Holton both testify that they hailed or signalled the driver to stop, and permit the appellant to get on the car; that the driver paid no attention to their signals, although he appeared to be looking towards them; and that he did not stop the car. The appellant went towards the car, and took hold of the handle at the side of the car, by the platform, and attempted to get on the car, but by some means his foot slipped from the step, and he fell at the side of the car, and his third finger, on which he had a heavy ring, caught in the handle in such manner that he could not get his hand loose from the handle of the car, and he was drawn along by the side of it, hanging by his finger, for about 160 feet, to the middle of Sixth street, where the car was stopped and he was released. His finger was injured so that it is permanently flexed inward. The evidence on the part of the plaintiff shows that as soon as the appellant fell, he called out to stop the car; that those in the car called to stop the car, and rang the car bell violently; that other persons on the walk called to the driver to stop the car; and that finally two persons ran in front of the horses, about the middle of Sixth street, and threw up their hands to stop the horses, and that the horses and car then stopped. Several witnesses testified that they were on the sidewalk within 30 feet of the car, and that the driver made no effort to stop the car or horses; that the horses were pulling the car, and the wheels of the car were turning; that the car was not sliding; that it was snowing; that there was a high wind from the east, the direction in which the car was going; and that there was considerable snow on the track at the time. These witnesses also testified that the driver seemed to pay no attention to anything which was going on about him, but looked straight before him, apparently without making any attempt to stop the horses or the car. These statements of the plaintiff's witnesses as to the apparent inattention of the driver as to what was going on about him is to some extent corroborated by the evidence of the driver himself. He testifies that he did not see either Holton or the appellant signal to him to stop the car; that he did not know that any one got on the car, or attempted to get on it, between Seventh and Sixth streets; that he heard no one call him to stop the car, and saw no one in the street in front of the horses when they stopped on Sixth street; that after the horses were stopped, he did not see the appellant, or know that he was

injured, or how he was injured ; but he does testify that when he was about 120 feet from where the horses stopped he heard the bells ring violently, as though something was the matter, and he immediately set the brakes so as to stop the wheels of the car from turning, and held up his horses, but that the car slid, and he could not stop it until it stopped in the middle of Sixth street.

The main contention of the plaintiff on the trial was that the driver was negligent in not stopping the car immediately after the plaintiff slipped and fell, and that he wrongfully and negligently dragged him, whilst hanging by the finger to the car, for a long distance, by reason of which he was greatly injured. It was also claimed by the appellant that the car handle was not constructed in a proper manner, and that it was negligence on the part of the defendant, that no conductor was on the car. On the trial, however, these charges of negligence were not claimed by the plaintiff to have been established by the evidence, and his counsel relied mainly upon the negligence of the driver as a ground upon which to base a recovery. The charge of negligence of the driver was the main question in the case, and it was met by the company with the claim that on account of the condition of the track and the descent in the grade at the place, the driver could not stop the car by the use of all reasonable means and appliances, sooner than it was stopped. That the plaintiff was dragged, as he was, and the distance he was, because it was impossible for the driver to stop the car, and not because the driver neglected the use of any proper means for stopping the same. Against the testimony of several apparently creditable witnesses, who had ample opportunity of seeing what was done, and who testified that the horses were not held up, but were drawing the car until stopped by the men in front of them, in the middle of Sixth street, and that the car did not slide, but the wheels were turning,—the driver alone had testified that he set the brakes so as to stop the wheels, that the car slid, and the horses were held back by him. In this state of the evidence the court allowed the respondent to introduce witnesses showing the descending grade of the track between Seventh and Sixth streets, and also showing that at times in the winter season, when the track was slippery, the cars would slide down that grade, notwithstanding the brakes were set, and the horses were held up. Admitting that this evidence was competent as tending to confirm the testimony of the driver, that the car slid down the grade at the time the accident happened, it was certainly far from being conclusive upon the question whether it did, in fact, slide at the time in question. Whether it

would slide at the time in question depended upon the condition of the track at the time. If, as claimed by the appellant, there was considerable snow on the track at the time, with the wind blowing at the rate of 30 miles or more, directly in the face of the car, there was no evidence given on the part of the defendant except the evidence of the driver, that it did slide although the brakes were properly set, and the horses held back. In this state of the evidence the learned circuit judge instructed the jury as follows: "The jury are instructed that if they find from the evidence that the plaintiff attempted to board the car without the knowledge of the driver, the car being reasonably safe for the use of this road, and in so doing slipped before he got upon the car, and the finger with the ring upon it caught and became fastened in the handle, thereby causing him to be dragged; if the car was upon the down grade upon Grand avenue; if the driver, so soon as he was notified by the bell or noise that something was the matter, set the brakes as tightly as he could, and made all reasonable and proper efforts to stop the car, but that on account of the weather and the slippery condition of the track the car continued to descend the hill, dragging the plaintiff until it was stopped at Sixth street,—then, and in such case, the plaintiff cannot recover in this action, and your verdict must be for the defendant." "With respect to the question whether the cars would slide when upon the down grade of Grand avenue, when the brake is firmly set, and the car be for a time beyond the control of the driver, the jury are instructed that the defendant has presented the testimony of some six witnesses who testified to a practical knowledge, acquaintance, and experience with the subject, and have testified positively that such is the fact." "The testimony of the plaintiff on the subject is simply to the fact two or three witnesses have testified that they never have noticed cars to slide. The testimony of the defendant's witnesses on that subject is positive. The testimony of the part of the plaintiff in that regard is simply negative testimony, and amounts to but little more than, so to speak, a mere *scintilla* of evidence, and does not justify the jury disregarding the positive and otherwise unimpeached testimony that such sliding does occur." "The evidence in this case, therefore, justified the court in instructing you that it is established by the evidence in the cause that, in the winter season, cars coming upon the down grade of Grand avenue will slide, even when the brake is completely set, and the car for a time, until its momentum is overcome by the resistance of the brake, passes beyond the control of the driver to stop it. The jury must take that as an established

fact in this case, and determine the questions submitted to it, in the light of such established fact."

We think this charge was misleading. The question for the jury in the case was not whether, under certain conditions, a car would slide upon the track with the brakes set and the horses held back, but whether it did slide with the brakes set and the horses held back at the time in question, and under the conditions shown by the evidence. In the second and third paragraphs excepted to the learned judge instructs the jury that it is conclusively established "that cars would slide when on the down grade of Grand avenue, when the brake is firmly set, and the car be for the time beyond the control of the driver." The learned judge does not state what the condition of the track must be, when the cars on that grade would be beyond the control of the driver, but declares generally that it is conclusively established "that the cars would slide when on the down grade," without regard to the condition of the track or the weather. In the last paragraph of the instructions excepted to the learned judge qualifies his statement by saying that it is conclusively established that the cars will slide in the winter season, with the brakes firmly set, without any other qualifications as to the condition of the track or state of the weather, and then concludes the instruction by saying that "the jury must take that as an established fact in this case, and determine the questions submitted to it, in the light of such established fact." It seems to us that when the court instructed the jury that they must take it as an established fact, in the case they were considering, that, in the winter season, cars coming down the grade of Grand avenue would slide, though the brakes were set firmly, and for a time be beyond the control of the driver, the jury might well understand the instructions to mean that, in the case they were trying, it was established that the car did slide as testified to by the driver. The car was conclusively shown to be coming down the grade of Grand avenue, and it was in the winter season that the accident happened. We are very clear that, under the evidence in this case, it was error for the court to instruct the jury that the car was beyond the control of the driver at the time the accident happened, and that, under the instructions given, the jury would be very likely to understand that the court so intended to instruct them. It is said by the counsel for the respondent that if the instructions above quoted were not strictly correct, under the evidence, yet, as there was a special verdict, and the jury have found that the plaintiff was not in the exercise of ordinary care when he was

Instruction
held mislead-
ing—Car slid-
ing—Condition
of tracks.

injured, no harm was done, as the plaintiff, under the finding, cannot recover in any event. It is evident that this finding, if it can be supported by the evidence, must relate to the want of care on the part of the plaintiff at the time he attempted to board the car, and could not relate to any want of ordinary care on his part after he fell and was dragged by the car. The learned judge properly instructed the jury on the subject as follows: Contributory negligence—Proximate and remote cause. “But it is contended, as you will observe, in this case, that the injury may have been occasioned, not by the fall, but by the dragging of the plaintiff. That circumstance enables me to give you this instruction: Even if the plaintiff was guilty of negligence in attempting to get on the car while it was in motion, yet if the jury find from the evidence in the case that the driver was notified that the plaintiff had fallen, and was being dragged at the tail of the car, and the jury also find that the driver could have avoided the injury by the exercise of reasonable care, then the defendant is liable.” It is upon the theory set forth in this instruction that the plaintiff sought a verdict in this case, and it is very clear that there is no evidence even tending to show that the plaintiff was not in the exercise of such care as it was possible for him to exercise after he fell, and was caught by his finger. The material question in the special verdict was the sixth question, viz.: “Was the driver of the car guilty of negligence in not stopping the car when he was notified that the plaintiff had fallen?” The instructions above quoted, and to which exceptions were taken, have peculiar reference to this question, and, as we think, must have been understood by the jury as tantamount to a direction to find that the driver was not guilty of negligence in not stopping the car, because the evidence was conclusive that he could not control it at the place where the accident happened.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

- **Boarding Moving Street Cars.**—See *Stager v. Ridge Ave. Pass. R. Co.*, 33 Am. & Eng. R. R. Cas. 540; note, 33 *Ib.* 550.

HAYMAN

v.

PENNSYLVANIA R. CO.

(Pennsylvania Supreme Court, January 16, 1888.)

Passenger—Personal Injuries—Presumption of Negligence.—The legal presumption arising from injuries sustained by a passenger in the course of the journey that the accident was due to want of proper care on the part of the carrier, has no application in a case in which the injuries complained of were received by a passenger while passing in the course of his journey from the station to a ferry, and were caused by pushing his hand through the glass of a swing door at the entrance to the ferry landing, such door being no part of the machinery employed for the carriage of passengers, and being constructed in the same way as swinging doors to be met with in any place of business.

·**ERROR** to Court of Common Pleas, Philadelphia County.

Trespass on the case by Joseph Hayman against the Pennsylvania R. Co. to recover damages for personal injuries. Plaintiff brings error, to review a judgment of nonsuit.

Jacob Singer and *Emanuel Firth* for plaintiff in error.

David W. Sellers for defendant in error.

WILLIAMS, J.—The complaint of the plaintiff in error in this case is that the court below directed the entry of a compulsory nonsuit on the conclusion of his evidence.

Facts.

The sole question for consideration, therefore, is whether the evidence was sufficient to sustain a verdict in favor of the plaintiff. The facts disclosed by it are that the plaintiff had purchased a ticket from the defendant company entitling him to carriage from Philadelphia to Burlington, New Jersey, and was proceeding from the ticket office to the boat on which a part of the journey was to be made. His route was through a long, narrow passage intended to accommodate persons passing in single file. At the end, near the landing, was a door, the upper half of which was provided with glass, and which swung either way, to permit the passage of persons to and from the boat. The person in front of plaintiff passed out at the door, leaving it to swing back behind him. The plaintiff put out his hand to arrest his motion, and push it open again, and, instead of directing his hand towards the frame or wooden portions of the door, pushed it against

the glass, which broke under the force of the impact, and let his hand through, cutting it, and inflicting the injury sued for. This was the whole case, and upon it the plaintiff contends that he should have been allowed to go to the jury upon the ground that the mere happening of the injury raises *prima facie* a presumption of negligence, and throws the burden of disproving negligence on the carrier. In support of this position, he cites *Laing v. Colder*, 8 Pa. St. 474, and several cases following it. The authority of these cases is beyond question, but the applicability of the rule established by them to this case is not. The rule requires that a carrier of passengers shall exercise "the utmost degree of care and diligence" to secure the safety of its passengers. To this end, it must provide a safe road-bed, well-constructed cars, engines, and skilful, trustworthy servants to take charge of the movement and management of trains. All these things are under the exclusive control of the officers of the company. The public have no right, and no opportunity, to interfere in regard to them. When, therefore, a passenger is injured by a collision, or other accident, while on his journey, the law presumes the accident to be due to want of proper care on the part of the company conducting the transportation, and puts the burden of showing the actual condition of the track, the car, or other appliances involved in the accident, upon the only party in a condition to bear it, viz., the carrier, which has the exclusive possession and care of it. The legal presumption takes the place of the proof which the injured person is unable to make, and puts the carrier at once upon the defence. *Laing v. Colder*, *supra*; *Meier v. Railroad Co.*, 64 Pa. St. 226; *Railroad Co. v. Anderson*, 94 Pa. St. 358. But the reason ceasing, the rule ceases. If an intoxicated person, after having purchased his ticket at a railroad station, should, on his way out of the ticket-office, stumble upon a heated stove, and suffer serious injury, there would be no reason for excusing the injured man from making out his case because he had a railroad ticket in his pocket, or because the stove on which he fell belonged to a railroad company, or was standing in a railroad station. It was no part of the machinery of transportation, and was in no sense peculiar to the business of the railroad company.

Presumption
of negligence
does not arise.

The same thing is true of the case in hand. The plaintiff was injured in the waiting-room or passage-way leading to the wharf, by putting his hand through the glass in the swinging door. The door was no part of the machinery employed for the carriage of passengers. It was not built upon a pattern peculiar to the defendant company. So far as the pleadings or the plaintiff's evidence enables us to judge, it was

constructed like the swinging doors to be met with in places of business in every part of the country. It was certainly visible to all comers and goers passing between the waiting-room and the boat, for it was so located that all passengers were obliged to push it open in passing to and from the landing. If there was anything in the construction of the door that made it unfit for the purpose for which it was used, or the place at which it was located, it was easy for the plaintiff to show it by a multitude of witnesses. There was no reason, therefore, for resorting to the legal presumption of negligence in aid of the plaintiff's case. The cause of the accident and the erection and construction of the door were as clearly known to the plaintiff as to the defendant and its employers; and it was the duty of the plaintiff to make out his cause of action in this case as he would be bound to do if the swinging door had been in a hotel or store. Not having done this, the court was clearly right in ordering the nonsuit. Judgment affirmed.

Presumption of Negligence in Case of Injury to Passenger.—See *Patter v. Chicago, M. & St. P. R. Co.*, *ante*, 399, and note, 404.

ATCHISON, TOPEKA AND SANTA FE R. CO.

v.

JOHNS.

(*Kansas Supreme Court, June 11, 1887.*)

Personal Injuries—Negligence of Servants—Evidence—Sufficiency.—The evidence showed that three servants of a railroad company, a brakeman and two section foremen, in removing a trunk from where it lay, on the company's station platform, which was covered with ice, to a baggage car, slid it on the ice, and out of a straight line, and against the plaintiff, who was standing in plain view upon the platform. *Held*, that the evidence was sufficient to prove culpable negligence on the part of the railroad company's servants.

Same—Scope of Employment—Presumption.—In such case, as the servants were then on the company's premises, performing this duty for the company, in the presence of other servants, and as they had performed similar services on prior occasions, it will be presumed that they were acting within the scope of the authority given to them by the railroad company.

Same—Contributory Negligence.—An old lady went to a railroad station to assist friends, who intended to remove from the country permanently, to get to the station, and upon a train then about to depart, and after bidding her friends good-bye, and after they had got upon the train, stood for

about five minutes upon the station platform to see the train start, and to bid her friends a last farewell. *Held*, that while so standing upon the platform, she was not, by reason thereof, guilty of such culpable contributory negligence as would prevent her from recovering for injuries received through the negligence of the railroad company; and further, that no culpable contributory negligence in any respect was shown.

Evidence—Declarations—Pain and Suffering.—Declarations of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind, may generally be shown by any person who heard the same; and no material error was committed in this case by the admission of evidence tending to show the declarations of the plaintiff with regard to pain, suffering, and condition of the body.

ERROR to District Court, Greenwood County.

Action brought by Mary Johns against the Atchison, Topeka & Santa Fe R. Co., to recover damages for injuries received by her while standing on the station platform at Severy, by reason of the negligence of the defendant's servants in removing a trunk from the platform to the baggage-car of a train then standing at the station. The defendant brings error.

George R. Peck, A. A. Hurd, and C. N. Sterry for plaintiff in error.

T. J. Hudson, T. L. Davis, and R. P. Kelley for defendant in error.

VALENTINE, J.—The facts of this case, stated briefly, are substantially as follows: On February 6, 1883, the plaintiff, Mrs. Johns, who was then about 63 years of age, ^{Facts stated.} went to the railroad station at Severy, Greenwood County, Kansas, along with certain of her friends who were then about to start for Washington Territory to make it their permanent home. She went along with her friends to assist them in getting to the railroad train and upon it, and to bid them good-bye. These friends were Mrs. Pitzer, who was also an old lady about the plaintiff's age, and Mrs. Pitzer's daughter and son-in-law and their several children. This station is a union station or depot belonging to the Atchison, Topeka & Santa Fe R. Co. and the St. Louis & San Francisco R. Co. These two railroads cross each other at that place at right angles,—the Atchison, Topeka & Santa Fe Railroad running north and south, and the other railroad running east and west,—and the station is situated in the south-west angle formed by this crossing, immediately west of the Atchison, Topeka & Santa Fe Railroad, and immediately south of the other railroad. A platform, about 16 feet wide and 195 feet in length, is situated between the station-house and the defendant's railroad track. This platform at that time was covered with ice, and had been in that condition for several days. The railroad train upon which the plaintiff's friends expected

to travel, and which consisted of an engine, a baggage car, and a passenger car, was then standing on the defendant's railroad track, east of the station platform, and headed to the north. The plaintiff bid good-bye to those of her friends who were about to leave, and they, with other friends who did not intend to leave, went into the passenger car. The plaintiff then stepped back about 10 feet from the east edge of the platform, and opposite the coupling between the baggage car and the passenger car, and stood there on the platform for the purpose of waiting till the train should start, and to bid her friends a last farewell. There was a waiting-room in the station-house or depot, to which she might have retired if she had so chosen. There were also, at that time, two or three large trunks, belonging to "drummers," situated on the platform several feet south, and slightly to the east of where the plaintiff was standing, which were to be removed and placed in the baggage car, which was north and east of where the plaintiff was standing. This platform was slightly inclined downward from the west side to the east side. Three of the company's servants undertook to remove these trunks. They did not use trucks, or any other vehicle or instrument of conveyance, but slid the trunks on the ice. In removing the first trunk, they struck the plaintiff, and knocked her down, and in this manner inflicted the injury of which she now complains. The trunk itself was propelled against her. This occurred within five minutes after the time when the plaintiff had bid her friends good-bye. She saw the man removing the trunk, and watched them, not thinking, however, that they would run against her, or molest her in any manner; but, when they came within about six feet of her, she attempted to move out of their way, but did not succeed in doing so. The evidence did not show whether the men saw her or not until after she fell; but there was nothing to prevent their seeing her if they had looked in that direction. There was plenty of room on the platform, east of where the plaintiff stood, within which the trunk might have been moved without touching her. The only persons near her at the time, except the three men who were moving the trunk, were a friend of the plaintiff, Mrs. Miller, and Mrs. Miller's little boy.

The case was tried before the court and a jury; and after the plaintiff had introduced her evidence, which tended to prove all the foregoing facts, the defendant demurred to the evidence upon the ground that it did not prove, or tend to prove, any cause of action, which demurrer the court overruled. No other evidence was introduced. The defendant then presented to the court 41 special instructions for the jury, and asked the court to give them to the jury, all of

which the court refused, and gave only its own instructions. The defendant then presented 63 special questions of fact for the jury, and asked the court to submit them to the jury, all of which, except four, to-wit, the second, twenty-third, twenty-fourth, and sixty-third, the court did submit to the jury as requested. The jury found a general verdict in favor of the plaintiff, and against the defendant, and assessed the plaintiff's damages at \$4000, and also gave answers to the foregoing special questions of fact. The defendant then moved for a judgment in its favor upon the special findings of fact notwithstanding the general verdict, which motion the court overruled. The defendant then moved for a new trial upon various grounds, which motion the court also overruled. The court then rendered judgment upon the verdict and findings of the jury in accordance with the general verdict. Afterwards the defendant made a case for the supreme court, and, as plaintiff in error, has brought such case to this court, and asks for a reversal of the judgment below.

The first question to be considered in this court is whether the plaintiff below introduced sufficient evidence to authorize the jury to find in her favor with reference to every essential fact constituting her cause of action. This question was raised in the court below by the demurrer to the evidence, by the motion for judgment on the special findings, and also by the motion for a new trial. The plaintiff in error (defendant below) claims that the evidence is insufficient, for the following reasons: (1) There was no evidence tending to prove any culpable negligence on the part of the defendant; (2) there was no evidence tending to prove that the three servants of the defendant who moved the trunk were acting within the scope of their employment; (3) the evidence discloses culpable contributory negligence on the part of the plaintiff below. The first two points, we think, should be discussed together. Of course, the plaintiff below knew the exact condition of the platform and its surroundings, and that the defendant's servants were moving the trunk towards her; for all these things were in plain view, and she had eyes. But so, also, did the defendant's servants know all these things; for they also had eyes, and probably fully as good ones as the old lady had. But, if they did not know these things, then they were guilty of culpable negligence in not knowing the same. Presumably, they knew that the plaintiff was standing on the platform where she stood, and that, unless she hurriedly got out of their way, they would run against her in moving the trunk in the direction in which they were moving it, and as rapidly as they were moving it on the smooth ice of that platform; but, as before stated, if

Negligence of
servants—Suf-
ficiency of evi-
dence.

they did not know the same, they were equally as guilty of negligence, in running against the plaintiff and in knocking her down, as though they had in fact known all about these matters. It was their duty to know these things. The three men who undertook to remove the trunk were a brakeman belonging to that train and two section foremen at that place, all in the employment of the defendant. They had also all done similar work on several prior occasions; and being on the company's premises performing this duty of removing trunks for the defendant in the presence of other employees of the defendant, and having done similar work on prior occasions, it must be presumed that they were acting for the defendant, and within the scope of the authority given to them by the defendant. The defendant, then, is responsible for their negligence, and they were clearly guilty of culpable negligence. The question as to whether the plaintiff was guilty of contributory negligence was fairly submitted to the jury, and they found that she was not guilty of any such negligence; and upon the evidence introduced we think their verdict is correct. As the train upon which the plaintiff's friends were expecting to depart was soon to start, we do not think that the plaintiff was guilty of any contributory negligence in

remaining on the platform where she stood until the train started. She was not necessarily in any person's way, and such a thing is common at all stations on all railroads. The plaintiff certainly could not be considered as a trespasser upon the company's premises; and, if not, then the defendant and its servants owed her the duty of exercising reasonable and ordinary care and diligence, to avoid injury to her. We do not think they exercised any such care or diligence, but really they were guilty of gross negligence. The plaintiff was not standing in a straight line between the place where the trunks lay on the platform and the place on the platform from which they were to be taken into the baggage car; and the men moving the trunk had to move the same out of a straight line, and up a slightly inclined plane, in order to strike the plaintiff. There was plenty of room on the platform, and in a straight line, within which the trunks might have been moved from where they lay to the baggage car, without molesting the plaintiff.

The plaintiff in error (defendant below) also claims that the court below committed material error in permitting the following evidence to be introduced, to-wit: Mrs. M. D. Thatcher was permitted to testify, over the objections of the defendant, among other things, as follows: "Well, I only know what Mrs. Johns has told me of her suffering, and I have been called in there as a

Plaintiff not
guilty of con-
tributory neg-
ligence.

Admissibility
of declarations
of pain and
suffering.

neighbor. She complained of the misery in her side, and she told me that she suffered a great deal with a numbness and a tingling sensation in her left side, I believe it was. And the other evening I was called over there, and she told me that she was suffering now a great deal with that feeling, and also a depression about her heart, she said, in her left side, and she had sent for the physician, I believe, that evening. And that was some of the symptoms, I believe, that she had,—of some kind of depression about her heart, a smothering, I think. . . . Mrs. Johns has complained of her limb and her foot to me.” Joseph H. Pitzer was permitted to testify, over the objection of the defendant, among other things, as follows: “*Question.* Now, Mr. Pitzer, state to the jury what facts you may know with reference to her condition,—with reference to her suffering and bodily pain and mental distress. *Answer.* I don’t know anything; only what she has told me herself. *Q.* What have you heard her say about it? Of what has she complained? *A.* She has told me frequently that she has suffered. She complained of her head and leg having a great misery in it. . . . She complained of misery in her side and hip.” On cross-examination, he testified, among other things, as follows: “*Q.* All you know about her suffering and pains since the injury is what she has told you, is it not, Mr. Pitzer? *A.* That is all, sir.”

We think it is well settled that it is incompetent to prove the declarations of an injured party, or of a party suffering from some cause, made after the injury has happened, or after the cause of his suffering has transpired, with regard to the facts of the injury, or the cause of his suffering. *Rossa v. Boston Loan Co.*, 132 Mass. 439; *Morrissey v. Ingham*, 111 Mass. 63; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *Collins v. Waters*, 54 Ill. 485; *Denton v. State*, 1 Swan, 279; *Spatz v. Lyons*, 55 Barb. 476. And even proof of the declarations of a party with regard to past suffering or pain, or past conditions of body or mind, is not competent. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537; *Lush v. McDaniel*, 13 Ired. 485; *Reed v. New York Cent. R. Co.*, 45 N. Y. 574; *Rogers v. Crain*, 30 Tex. 284; *Chapin v. Inhabitants of Marlborough*, 9 Gray, 244; *Rowell v. City of Lowell*, 11 Gray, 420; *Emerson v. Lowell Gas-Light Co.*, 6 Allen, 146; *Inhabitants of Ashland v. Inhabitants of Marlborough*, 99 Mass. 48; *Insurance Co. v. Mosley*, 8 Wall. 397, 405; There are probably no authorities opposed to these propositions, and yet there are authorities which seem almost to oppose the last one, especially where the declarations are made to a physician or surgeon while he is examining the party as a patient. *Quaife v. Chicago & N. W. R. Co.*, 48 Wis. 513, 33 Amer. Rep. 821;

Barber v. Merriam, 11 Allen, 322; *Fay v. Harlan*, 128 Mass. 244; *Gray v. McLaughlin*, 26 Iowa, 279; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 23 Am. & Eng. R. R. Cas. 522, 22 Cent. Law J. 322. Declarations, however, of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind, may generally be shown by any person who has heard them. *Insurance Co. v. Mosley*, 8 Wall, 397; *Hatch v. Fuller*, 131 Mass. 574; *Denton v. State*, 1 Swan, 279; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *Collins v. Waters*, 54 Ill. 485; *Louisville, N. A. & C. R. Co. v. Falvey*, 184 Ind. 409, 23 Am. & Eng. R. R. Cas. 522, 22 Cent. Law J. 322; 1 Greenl. Ev. § 102. and cases there cited; 1 Whart. Ev. § 268, and cases there cited. There are authorities seemingly opposed to this last proposition. *Reed v. New York Cent. R. Co.*, 45 N. Y. 574; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.

We think, however, that whenever evidence is introduced tending to show a real injury or a real cause for suffering or pain, as in this case, the declarations of the party concerning such suffering or pain while it exists, and as simply making known an existing fact, should be allowed to go to the jury for what they are worth, and the jury in such a case should be allowed to weigh them, and to determine their value. If they were made to a physician or surgeon while he was examining the party as a patient, for the purpose of medical or professional treatment, and for that purpose only, the declarations would be of great value. If, however, they were made at any other time or under any other circumstances, they might not be of such great value. If made casually to some person not a physician, and with whom the party had no particular relations, they might possibly, in some cases, be of but very little or no value. *Reed v. New York Cent. R. Co.*, 45 N. Y. 574. Yet, generally, they should be permitted to go to the jury for what they are worth. *Insurance Co. v. Mosley*, 8 Wall. 397; *Hatch v. Fuller*, 131 Mass. 574; *Rogers v. Crain*, 30 Tex. 284; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487; *Gray v. McLaughlin*, 26 Iowa, 279; *Kennard v. Burton*, 25 Me. 39; *State v. Howard*, 32 Vt. 380; *Lush v. McDaniel*, 13 Ired. 485. Also, if the declarations are made to a physician or other person merely for the purpose of obtaining testimony in the party's own case, they might be of but very little value, and possibly might in some cases be wholly excluded. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537. But the mere fact that the declarations are made after suit has been commenced, and while it is pending, will not be sufficient to exclude the declarations;

and, generally, they should be allowed to go to the jury. *Barber v. Merriam*, 11 Allen, 322; *Hatch v. Fuller*, 131 Mass. 574.

In the present case we cannot say that the court below committed any material error in admitting the evidence objected to. Everything that the witnesses Mrs. Thatcher and Mr. Pitzer testified to was proved by the competent testimony of other witnesses. The injury, the impaired health, the suffering, the pain, and the entire condition of the plaintiff's body, were fairly shown by evidence that cannot be questioned; and very nearly all the declarations of the plaintiff, as testified to by Mrs. Thatcher and Mr. Pitzer, were, in substance, declarations of present and existing pain, suffering, and conditions of the body, and not narratives of past pain or suffering, or conditions of the body; and to this extent they were unquestionably competent. Those declarations, if any, which were not concerning present and existing pain, suffering, and conditions of the body, were so small in amount, and so trifling and insignificant in their influence, and were concerning matters which were so thoroughly and incontestably proved by other competent evidence, that their admission by the court could not be material error.

There are a few other questions presented by counsel which we hardly think it is necessary to discuss. The special question of fact, No. 63, which the defendant asked the court to submit to the jury, and which was refused, was sufficiently covered by other more specific questions. Besides, that question might perhaps be objectionable under the rule stated in the case of *Foster v. Turner*, 31 Kan. 58, 60, *et seq.* The instructions refused, so far as they stated the law of the case, were sufficiently covered by other instructions given by the court.

The judgment of the court below will be affirmed.

All the justices concurring.

Exclamations of Pain and Suffering by Party Injured.—See note, 31 Am & Eng. R. R. Cas. 356; *Louisville, etc., R. Co. v. Falvey*, 23 Ib. 522.

DOUGHERTY

v.

MISSOURI R. Co.

(Missouri Supreme Court, June 18, 1888.)

Passenger—Personal Injuries—Complaint—Amendment.—An amendment to a petition for damages for personal injuries sustained by a passenger upon a street car, which alleges in substance that the car horses were wild, scary, untractable, and skittish, and that a sudden and violent jerk in the starting of the car which caused plaintiff's injury was due not only to the negligence of defendant's servants, but also to the character of the horses, which was known to the defendant before the occurrence, does not substitute or add any new cause of action, being merely a specification of the negligence already embraced in other allegations.

Same—Duty of Carrier.—The exercise of the utmost human foresight, knowledge, skill, and care is required of all carriers of passengers generally and not merely of railroads operated by steam.

Same—Instruction—Contributory Negligence.—If other instructions sufficiently directs the jury as to the effect of contributory negligence on the plaintiff's right of recovery, and instruction that if the jury find the defendant guilty of negligence in certain particulars they must return a verdict for plaintiff, is not such as to warrant a reversal because it makes no reference to plaintiff's contributory negligence.

Same—Street Car—Instructions.—An instruction in an action to recover for injuries received while upon a street car, that if it appeared that the accident would not have happened had the plaintiff taken hold of a strap on entering the car, or taken a seat nearer the door than the one he attempted to reach, yet if the jury believed he acted with reasonable care under the circumstances he was using all the diligence required of him, will not require a reversal as giving undue prominence to the specified acts of negligence on plaintiff's part, when the instruction complained of is only one of a series of instructions which, taken together, correctly state the law of the case.

Same—Contributory Negligence.—An instruction that although plaintiff was guilty of negligence, yet if such negligence did not contribute to the injury, or if defendant's servants were negligent in the management of the car or in the use of unsuitable horses, "and that if there had been no such negligence on the part of the defendant said injury would not have happened, notwithstanding the negligence of plaintiff," is not open to the objection that it charges that even if the negligence of the plaintiff, as well as that of the defendant, contributed to the injury, the defendant is liable.

Same—Evidence—Unmanageable Horses—Former Driver.—In an action in which the plaintiff complains of injuries alleged to have been caused by the use of wild and unmanageable horses in a street car, it is not error to admit the evidence of a former driver of the car, that while he drove the car one of four teams employed in pulling it was wild and unmanageable, and that from his observation he knew that the same teams

were used at the time of the accident, although the particular team in use at the time of the accident was not identified by that or any other witness.

Same—Excessive Damages.—A verdict for \$12,000 in favor of the manager of a telegraph company, who was an expert operator, and earning about \$200 a month, for injuries threatening the loss of life, causing the amputation of an arm, impairing his efficiency as an operator one-half, and putting him to an expense of \$2000 for medicine and medical attendance, is not so excessive as to require a reversal, even if the case is one in which there can be no claim for punitive damages.

APPEAL from St. Louis Circuit Court.

Action by Christopher Dougherty against the Missouri R. Co. to recover damages for personal injuries sustained by plaintiff while a passenger upon a street car belonging to the defendant. Defendant appeals from a verdict and judgment for the plaintiff for \$12,000.

Dyer, Lee & Ellis for appellant.

Boyle, Adams & McKeighan and *Wm. R. Thompson* for respondent.

RAY, J.—Upon a former trial of this cause plaintiff was compelled, at the close of his evidence, to submit to a nonsuit; but on writ of error to the St. Louis court of appeals the judgment of the circuit court was re-versed. 9 Mo. App. 483. On writ of error by defendant to this court, the judgment of the court of appeals was affirmed. 81 Mo. 325; s. c., 21 Am. & Eng. R. R. Cas. 497. There has since been another trial of the cause in the circuit court, which resulted in a verdict for plaintiff in the sum of \$12,000 and judgment thereon, from which defendant has appealed to this court.

Former trials
—Verdict.

At the second trial, now under review, an amended petition was filed, containing the allegation of the original petition as given in 81 Mo., and other allegations (as to which some questions are now made), as follows: "Plaintiff states that the horses hitched to said car were wild, scary, untractable, and skittish; and that said sudden and violent jerk and movement of said car, causing said injury to the plaintiff, was due, not only to the careless, negligent, and unskilful manner in which the servants and employees of said defendant started and set in motion said car, but as well to the wild, untractable, scary, and skittish character of the horses hitched to said car, which unsafe character of said horses was long before well known to said defendant, its officers, agents, and employees, before said occurrence; and yet said defendant, contrary to its duty, carelessly and negligently continued to use said horses in the transportation of its passengers, and the plaintiff, as one of

Amendment to
complaint—
Allegations
harmless.

them, on the occasion referred to." These allegations, thus added, were not necessary to enable plaintiff to make the proof necessary to his *prima facie* case; which, if made, as might be done, under the circumstances of the case, by showing the injury to plaintiff while a passenger in defendant's car, would have devolved upon the defendant the burden of showing, among other things, upon the issue as to its negligence, that the team employed was a proper and suitable one. *Dougherty v. Railroad Co.*, 81 Mo. 330; s. c., 21 Am. & Eng. R. R. Cas. 497; *Hipsley v. Railroad Co.*, 88 Mo. 348; s. c., 27 Am. & Eng. R. R. Cas. 287; Ang. Carr. § 569. This presumption would itself stand in lieu of the actual proof as to the character of the team, until rebutted by the evidence on defendant's part. In this view, and under these authorities, the allegations were immaterial, unnecessary, and harmless. But if plaintiff saw fit not to rest his case upon the presumption in his favor arising upon the proof aforesaid, but desired to offer testimony to show defendant's negligence in the designated particular, then we see no good and sufficient reason why evidence as to the disposition of the horses,—whether vicious or not,—might not be received under the allegation that "defendant, its agents, servants, etc., disregarding its and their duty to the plaintiff as such passenger, so carelessly and negligently operated said car" as to cause the injury to plaintiff complained of. The amendment did not go to the gist of the cause of action, or substitute or add any new cause of action, but was, we apprehend, a specification of negligence already involved and embraced in the other allegations, which were in themselves sufficient upon the proof mentioned to create the presumption of negligence, or to admit direct testimony in that behalf.

Other questions involved arise upon the court's action in the matter of instructions. Our attention has not been directed by counsel to any error in the instructions refused for defendant, unless it be the ninth, which presented defendant's theory as to the act of neglect set forth in the amendment to plaintiff's petition, and is the converse of the ninth given for plaintiff, and was, we hold, properly refused, for the reasons already given. As to the others, their refusal was justified for the reason that the matters embraced therein were covered by those previously given in the cause. The refused instructions, therefore, may be dismissed without further notice.

On the part of plaintiff, the court gave the following: "(1) The court instructs the jury that if they believe from the evidence that the plaintiff was, at the time of the occurrence in question, a passenger on one of the cars of the defendant's street railroad, exercising reasonable care and diligence, and

that the car started before plaintiff took his seat, with a sudden and violent jerk, that by reason thereof the plaintiff lost his balance, and his hand was thrown against and through one of the windows of the car, cutting and injuring it, then, and in that case, the defendant is liable to the plaintiff for the damage caused by and resulting from said injury to the plaintiff; unless the jury further believes from the evidence that the defendant, its agents, servants, and employees managing said car, were not guilty of any negligence or want of care in the management of said car causing the injury, and the burden of showing such care and want of negligence is upon the defendant to prove to the satisfaction of the jury. (2) The court instructs the jury that if they believe from the evidence that the plaintiff was, at the time of the event in question, a passenger on one of the defendant's cars, then the defendant owed to the plaintiff the duty of exercising the utmost care and vigilance to carry him over its road safely, and is responsible to the plaintiff for any negligent or want of proper care, which the jury may find from the evidence if they so find, causing the injury in question arising from the management of the car and horses by the defendant's servants or employees, or from the use of skittish or unsuitable horses, causing the injury in question. (3) The court instructs the jury that if they believe from the evidence that, at the time of the event in controversy in this action, the defendant was engaged in the business of operating a street railroad for the transportation of passengers in the city of St. Louis, that at said time the plaintiff was received on one of its cars as a passenger to be transported thereon, and that while in said car for said purpose he was injured by a sudden and violent starting of the car, then the burden of proof rests upon the defendant to prove to the satisfaction of the jury that said injury was caused by something not under the control of defendant, and not from the use of unsuitable or skittish horses, or careless or unskilful driving or management of said car, and that by the exercise of the utmost human foresight, knowledge, skill, and care such injury could not have been prevented by defendant, its agents or servants; and, unless the jury so believe, they will find for the plaintiff. (4) The court instructs the jury that if they believe from the evidence that the plaintiff was a passenger on one of defendant's cars, and, while exercising reasonable care and diligence with respect to his own safety, the car started with a sudden and violent jerk, causing the injury now being inquired into, then the burden is thrown upon the defendant to show to the satisfaction of the jury that the horses hitched to the car were suitable for the service in question, or that the accident was

Instructions
on part of
plaintiff.

not due to the horses, and that the servant of defendant managing the car exercised the utmost care, skill, and foresight in the management of the same, or that the accident occurred by reason of some cause not under the control of defendant, or its servants and employees; and, unless the defendant has so satisfied the jury, their verdict should be for the plaintiff. (5) The court instructs the jury that if they believe from the evidence that the plaintiff at the time of the injury in question went upon the defendant's car as a passenger, and there was a vacant seat, then and in that case it was the bounden duty of defendant, its servants, and employees either to not start the car until he had time to get a seat, or, if it started it before, to use the utmost care to start it smoothly, and in such a manner as not to throw him off his feet. And if the jury believe from the evidence that the car was started before the plaintiff had reasonable time to take his seat, and with a sudden and violent jerk which might have been avoided, causing said injury, the jury will find for the plaintiff, unless it appears from the evidence that said jerk was produced by some cause not under the control of defendant, or its agents, servants, or employees. (6) The court instructs the jury that if they find for the plaintiff they will assess his damages at such sum not exceeding what as they may believe from the evidence will compensate him for amounts paid and contracted to be paid for medical attendance and attendance of nurses, if necessarily employed, and all mental and bodily pain and anguish they may believe from the evidence the plaintiff suffered, together with such sum or sums as will compensate plaintiff for any permanent injury and incapacity they may believe from the evidence he has sustained from the injury in question, but not exceeding the amount claimed in the amended petition. (7) The court instructs the jury that although, when the occurrence in question happened, the plaintiff had not paid his fare, and by reason of said event got off without paying, yet if the jury believe from the evidence that he went on the car as a passenger with the intention of paying his fare when called upon, then he was a passenger and the defendant owed to him the same duties as if in fact he had paid his fare. (9) The court instructs the jury that the express and specific allegations in plaintiff's amended petition with respect to the horses hitched to the defendant's car do not change the cause of action originally sued on, and the defence of the statute of limitations set up in the defendant's answer should be disregarded by the jury. (10) The court instructs the jury that although they may believe from the evidence that the plaintiff was guilty of negligence on his part at the time of the injury in question, yet if the jury

further believe from the evidence that such negligence did not contribute to or cause the injury, or if they find from the evidence that the defendant's servants or agents were negligent in the management of the car or in the use of unsuitable horses, and that if there had been no such negligence on the part of defendant said injury would not have happened, notwithstanding the negligence of plaintiff, then the jury will find for the plaintiff. (12) The court instructs the jury that although they may believe from the evidence that if the plaintiff had, on entering the car, taken hold of a strap, or taken a seat nearer the door than the one he attempted to take, the accident would not have happened, yet if the jury further believe from the evidence that he acted with reasonable and ordinary care, in not taking hold of a strap or in moving further forward, and as a prudent man under similar circumstances would ordinarily act, then he was using all the care and diligence imposed by law upon him. (13) The court instructs the jury that, if they find from the evidence that any witness has wilfully and corruptly sworn falsely to any material fact in the case, the jury may disregard the whole of his testimony. (14) The instructions of the court are all to be taken and read together, and the law therein laid down applied by the jury to the facts of the case accordingly as the jury may believe and find the facts to be, under the evidence before them."

The court gave the following instructions asked by the defendant: "(1) The court instructs the jury that even though they believe the defendant's company was to blame in starting the car in which plaintiff was standing with a violent and unusual jerk, and before plaintiff had an opportunity of taking his seat, yet if the jury also find that plaintiff was informed by the conductor's striking the bell, or in any other way knew or had reason to expect the car was about to start, then it was the duty of the plaintiff to have protected himself by the most prudent means within his reach against the starting of the car; and if you find that straps were provided in said car for the use or convenience of passengers, by which the plaintiff, after the warning of the conductor's bell, might have supported himself while the car was being started, and that he failed so to do, and by reason of such failure he was injured, then you will find the issues for defendant. (2) The court instructs the jury that it was not the duty of the defendant company to provide the plaintiff with a seat in the forward part or any particular part of its car, nor was it the defendant's duty to plaintiff to provide him with two seats, one for himself and one for Mr. McCreary, nor to provide plaintiff with room enough

Instructions
on part of
defendant.

for himself and Mr. McCreary, nor was it the duty of the defendant to wait before starting its car until plaintiff could reach seats for both himself and Mr. McCreary, nor was it defendant's duty to wait before starting its car until plaintiff had walked to the forward part of the car, if there was a seat for plaintiff nearer than that. (3) The court further instructs the jury that, although they may believe that the negligence or want of care of the agents and servants of the defendant contributed to the happening of the injury to plaintiff, yet if they believe from the evidence that the plaintiff was likewise guilty of negligence or want of care, which directly contributed to produce said injury, the verdict must be for the defendant. (5) The court leaves it to you to determine, in view of the evidence and the circumstances of the case, whether plaintiff was himself guilty of any fault or negligence that directly contributed to produce the injury in question, and you should determine this fairly, under the evidence, without bias for or prejudice against either party, and if you find the plaintiff guilty of such fault or act of neglect, then you will find in favor of the defendant. (6) The court instructs the jury that the defendant is not liable for any damage that resulted to the plaintiff by reason of any lack of care on his part in properly caring for and treating the wound which he received while in the car of the defendant; and if the jury believe, from the evidence, that by any act of imprudence on plaintiff's part, or that, by want of proper care or treatment of the wound received by plaintiff, the said injury was thereby aggravated to such an extent as to render necessary the amputation of plaintiff's arm, then the defendant is not liable for the damage to the plaintiff resulting from such amputation."

The objection taken to the third in the series for plaintiff is that it requires of the company "the exercise of the utmost human foresight, knowledge, skill, and care."

Duty of carrier—Degree of care.

These terms of strict care, so employed in the instruction, may apply, as council suggests, with special propriety such common carriers of passengers as railroads operated by steam, but they are also held applicable to common carriers of passengers generally. *Hutch. Carr.* §§ 500–504; *Lemon v. Chanslor*, 68 Mo. 340; *Railway Co. v. Twiname*, 13 N. E. Rep. 55; *Dougherty v. Railroad Co.*, 81 Mo. 330; s. c., 21 Am. & Eng. R. R. Cas. 427; *Kelly v. Railroad Co.*, 70 Mo. 609; *Leslie v. Railway Co.*, 88 Mo. 55; s. c., 26 Am. & Eng. R. R. Cas. 229.

The fifth, given for plaintiff, is complained of for the reason that it ignores the contributory negligence of plaintiff, and

authorizes and directs a verdict for plaintiff, without regard thereto. A similar omission in an instruction of this sort was held fatal error in the case of Sullivan *v.* Railway Co., 88 Mo. 182; but the doctrine of that case has recently been overruled in the late case of Owens *v.* Railroad Co., 33 Am. & Eng.

Instruction
ignoring con-
tributory neg-
ligence.

R. R. Cas. 524, and upon the authority of the Owens Case, and under the views there adopted by a majority of my associates, the omission of the defence of contributory negligence from the instruction under review is not to be regarded as fatal error, requiring a reversal of the judgment in the cause. My individual views as to this question are set forth in the opinions in the Sullivan Case, already referred to; but the instructions in this case, taken as a whole, are, in my judgment, far more satisfactory than those in the Sullivan Case.

Instruction No. 12, given in plaintiff's behalf, is complained of as erroneous and misleading, because it is claimed the instruction selects but two of the different facts charged in the answer as contributory negligence, and thus gives them undue prominence, and impliedly directs the jury, it is claimed, not to consider the evidence, if any, tending to prove the other facts not mentioned in the instruction, but charged in the answer as contributory negligence. The instruction is not fairly subject to these criticisms. It will be observed that it does not undertake to cover the entire case, and does not, upon a finding of the facts submitted, authorize a verdict in the cause. Properly limited and considered in reference to the matters treated of, the instruction is not, we think, objectionable. It cannot be said as matter of law that the duty absolutely devolved on plaintiff to take hold of the strap immediately on entering the car, or to take the seat nearest to the door, and it is in reference to plaintiff's conduct in this behalf that the jury are told that, if they believe from the evidence that he acted with reasonable and ordinary care in not taking hold of a strap, or in moving forward, and as a prudent man, under similar circumstances, would ordinarily act, then he was using all the care and diligence imposed by law upon him. It is with respect to such instructions, good as far as they go, but not complete in themselves, and not attempting to set out and cover the case, that reference may most appropriately be had to other instructions in the cause, and the series looked to and judged in its entirety. The prominence given in the evidence and cause to the question as to the proper use of the strap by passengers on such cars, not improperly, perhaps, called for a more specific instruction than would ordinarily be necessary, as to what, under the

Instruction
giving promi-
nence to speci-
fied acts of
contributory
negligence.

law, would be the duty of plaintiff in that behalf, and under other instructions in the cause the whole subject of plaintiff's conduct, as to this feature as well as the other acts alleged in the answer as negligence on his part, was, we think, properly submitted to the jury for their determination. Again, we think defendant's counsel misconstrues instruction numbered 10, given for plaintiff. It does not, as we read and understand it, say, as counsel claims, that where the negligence of plaintiff, as well as that of defendant, contributed to the injury alleged, the defendant is liable. Its very terms, we think, limit the negligence of plaintiff which may co-exist with liability on the part of defendant to such as does not contribute to or cause the injury. If, however, by reason of its construction, it may be somewhat involved, or obscure, the other instructions in the cause unquestionably remedy that defect. Instructions numbered 1, 3, and 5, given for defendant, which are exceptionably strong for defendant, are not, we think, contradictory, and taken together they set out the law in his behalf as favorably as defendant could ask, and in terms so plain that the jury could have hardly failed to understand and apprehend their meaning. This disposes of the principal objections urged against the court's action in the matter of instructions. The objection to them, it will be observed, arise mainly upon the issue as to plaintiff's contributory negligence. As to the evidence upon that issue, it is sufficient to say that the facts are in dispute and doubt, the evidence conflicting, and that defendant manifestly has no reason to complain that the issue was sent to the jury for their determination.

A question is also made upon the admission of portions of the testimony of the witness Newton Jarrett, who had been, it seems, several months prior to the date of the injury to plaintiff, in the employment of defendant as a driver of the car in which plaintiff was afterwards injured. His testimony as to the matter to be considered in this connection was that, during the period of his service as driver in charge of the car in question, four certain teams belonged to and were used in the operation of said car. He further testified that, after leaving his said employment, which it seems he did in November or December, 1876, he was engaged in business for the next six or twelve months at a telegraph office, which, it appears, is situated on the line of this street railroad, and that he thus had opportunity to see the car passing back and forth every day during the winter and spring and summer following, which includes the date of injury, which occurred in April, 1877, and that, so far as he observed or knew, there was no change in the teams used in connection with the car in question. One of these

Evidence—Testimony of former driver.

teams was composed, as he testifies, of a stallion and gelding, which were troublesome and very mean, in starting the car with a jerk; that the drivers complained of this team, which he testifies "would draw themselves in the collar and back up the traces, and as soon as the bell would tap, unless the driver held his reins tight, one of the horses would throw himself right forward, and start the car with a jerk." The three other teams, he says, started of their own accord in such a manner as not to produce a jerk to the car. We are not prepared to say that there was error in the admission of Jarrett's testimony in this behalf, requiring a reversal of the judgment in the cause. True he says he does not know that this team was in fact attached, but his testimony further is that the other teams, ordinarily and regularly used with this intractable team in drawing the car in question, were gentle, and started the car when the bell tapped in such manner as not to give the car a jerk, and that this was so even if the driver was himself to some extent negligent and careless. The driver, Lyon, in charge of the car at the time, subsequently testified for defendant that the team in use was a certain team of mares, and he was, we believe, the only witness who attempts to identify directly and positively the particular team in use at the time. But his statement in that behalf was not necessarily undisputed or conclusive. His testimony in his entirety was before the jury, and his credibility was for them. The evidence in the cause indicates that, by means of the reins and the car-brake, the driver could effectually control the horses and the movements of the car; and upon the issue as to defendant's negligence the real question was, we think, whether the defendant had overcome plaintiff's *prima facie* case, and shown that the driver was without negligence or fault as to his management and control of the motive power. And this was for the jury, under proper instructions.

A remaining question urged in the argument is that the damages are excessive. Plaintiff's left hand and arm were, in consequence of the fall given him by the violent jerk of the car, thrust through the glass window of the car, and a severe and painful wound, and some smaller cuts, perhaps, were inflicted upon his left hand. His health for several months was seriously affected, and loss of life was threatened for a time. After ineffectual efforts to save the hand, which was injured in April, it became necessary in the following July to amputate the same, which was done about two inches below the elbow. His sufferings were great, and his expenses and liabilities for medicines, nurse hire, physicians, and surgeons very heavy, amounting to something like \$2000. At the time of the accident he was

Damages not
Excessive.

manager of the Gold & Stock Telegraph Co., which was engaged in the business of furnishing stock, grain, and provision quotations to brokers and the Merchants' Exchange of St. Louis. His salary amounted to \$144 per month, and, being an expert or first-class telegraph operator, he also sometimes earned \$50 per month extra. During his sickness his employers continued him his salary, so that he lost no wages during that time, and he continued thereafter and up to the time of trial to earn as much salary as before the accident. There is evidence to show that his value and usefulness as a telegraph operator was greatly impaired, to the extent, perhaps, of one-half. This is, we believe, the substance of the evidence bearing upon the question now before us. The case it may be observed is free from malice or wanton misconduct on the part of defendant or its servants. The instruction given by the court, in this behalf, limits the recovery to compensating damages, and has not been objected to, and is substantially correct. The verdict was for \$12,000. As is said in the case of *Waldhier v. Railroad Co.*, 87 Mo. 37: "It is a matter of much difficulty in such cases as this to tell when the verdict is or is not excessive. The amount of damages must be left to the reasonable discretion of the jury." In that case, where the plaintiff had lost both legs, a verdict for \$25,000, after a *remittitur* for \$5000 and the accrued interest, was suffered to stand. In the case of *Porter v. Railroad Co.*, 71 Mo. 66, where the injuries to plaintiff resulted in the amputation of one leg and two toes of the other foot, a verdict for \$10,000 was not disturbed. In these and other cases large verdicts have been allowed to stand. In the case at bar, the jury, in the exercise of their sound and reasonable discretion in the matter, might well have returned a verdict for a lower sum; but we are not prepared to say that the sum given is so large as to unmistakably evince prejudice and passion on the part of the jury, and abuse of their discretion in the matter. Some other exceptions were taken at the trial, and are urged here, which have been considered, but which we deem it unnecessary to discuss. This leads to an affirmance of the judgment of the trial court, and it is accordingly so ordered, with the concurrence of all the judges.

See *Dougherty v. Missouri R. Co.*, 21 Am. & Eng. R. R. Cas. 497.

Excessive Damages for Personal Injuries.—See note 33, Am. & Eng. R. R. Cas. 520; *Norfolk, etc., R. Co. v. Burge* (Va.), 32 Ib. 101; *Louisville, etc., R. Co. v. Thompson*, 30 Ib. 541; note, 543; *Hobson v. New Mexico, etc., R. Co.*, 28 Ib. 360; *South Cov., etc., R. Co. v. Ware*, 27 Ib. 206; note, 23 Ib. 308; *Missouri Pac. R. Co. v. Mackey*, 22 Ib. 306; *Memphis, etc., R. Co. v. Stringfellow*, 21 Ib. 374; *Kansas Pac. R. Co. v. Peavy*, 11 Ib. 260; *Klutts v. St. Louis, etc., R. Co.*, 11 Ib. 639; *Funston v. Chicago, etc., R.*

Co., 14 Ib. 640; Atchison, etc., R. Co. v. Moore, 15 Ib. 312; Knowlton v. Milwaukee, etc., R. Co., 16 Ib. 330; Sioux City, etc., R. Co. v. Finlayson, 18 Ib. 68; Ferguson v. Wisconsin Cent. R. Co., 19 Ib. 285; Houston, etc., R. Co. v. Shafer, 6 Ib. 421; Delie v. Chicago, etc., R. Co., 5 Ib. 464.

STEWART

v.

BOSTON AND PROVIDENCE R. CO.

(*Massachusetts Supreme Judicial Court, May 4, 1888.*)

Passenger—Mistake as to Train—Changing Coaches—Personal Injuries.—A passenger who has taken the wrong train by his own fault, and, on being informed by the conductor that by taking a rear car he could get off at a station beyond and return to his destination at a later hour, attempts to pass to such car, does so at his own risk as to all accidents not arising from the negligence of the company, and cannot recover for injuries sustained by being thrown from the platform by a lurch of the train such as is inevitably incident to any train moving at the same speed.

ON report from Superior Court, Suffolk County.

Action of tort by William B. Stewart against the Boston and Providence R. Co. to recover damages for personal injuries. The court directed a verdict for defendant. The facts appear in the opinion.

Geo. A. Perkins for plaintiff.

George Putnam and *Thomas Russell* for defendant.

MORTON, C.J.—The plaintiff took the wrong train through his own fault. After the train had started, the conductor discovered this, and informed the plaintiff that he could not stop at the point to which he wished to go; but that, by taking one of the two rear cars, he could get off at a station beyond, and return to his destination at a later hour. This was not a command or direction by the conductor that the plaintiff should go from the car he was in to the rear car, which justified him in doing so at the risk of the defendant. By going from one car to another of a rapidly moving train, merely for his own convenience, the plaintiff took upon himself the risk of all accidents not arising from any negligence of the defendant. While crossing over one of the platforms between the cars, the plaintiff came in collision with another passenger crossing the platform in an opposite direction; “the train gave a

Plaintiff took risk of accident.

lurch to the left," and he was thrown from the platform. There is nothing to show that the lurch was extraordinary, or anything more than a usual and inevitable incident of a swiftly-moving train. The evidence fails to show any negligence of the defendant which caused the accident, and the superior court therefore rightly directed a verdict for the defendant. Judgment on the verdict.

Passing Over Platform of Moving Train by Direction of Conductor.—
Louisville, etc., R. Co. v. Kelley, 13 Am. & Eng. R. R. Cas. 1.

LAKIN

v.

OREGON PACIFIC R. CO.

(Oregon Supreme Court, June 13, 1887.)

Passengers—Personal Injuries—Contributory Negligence.—A passenger who returns to a train which has stopped to allow passengers to dine, before the conductor has called upon the passengers to re-enter the cars, is not, in so doing, guilty of negligence contributing to personal injuries sustained before the other passengers had been required to board the train.

Same—Engineer—Employment—Scope of Authority.—A carrier owes to its passengers the duty of carrying them to their journey's end, and protecting them from injury from any source that human judgment and foresight are capable of providing against, and a railroad company is responsible to a passenger for injuries caused through the negligence of an engineer placed upon the engine "to learn the road" by the managing agent of the company, although the latter had no authority to employ any person, such engineer being aboard the engine serving the company in the transportation of passengers at the request and at the acquiescence of its servants and agents.

Same—Evidence—Competency.—In an action to recover damages for injuries alleged to have been caused by the negligence of defendant's servants, the plaintiff may, for the purpose of showing how she received the injuries, testify as to the construction of the car, and the position in which she was at the time of the accident.

Same—Evidence—Defective Appliances—Competency.—In an action for damages for injuries alleged to have been caused by negligence in the management of a train, it is not error to allow the engineer in the course of his narrative of how the accident happened to state that the engine boiler leaked steam.

Same—Instruction—Scope of Employment.—A railroad company being bound to exercise the highest degree of care that human foresight can provide in carrying passengers to their journey's end, an instruction, in an action to recover damages for injuries alleged to have been caused by

a company's servants, that if the employees of the company, i.e., the fireman and brakeman, moved or "permitted the engine to be moved, without the consent of the engineer, whether within the scope of their employment or not," the company would be liable for injuries arising therefrom, will not be a ground for reversal, if the circumstances are such that the company would be liable for the acts of the fireman and brakeman in any event.

APPEAL from Circuit Court, Benton County.

Action to recover damages for injuries received by plaintiff while a passenger upon a train of the defendant company. The opinion states the case.

John Kelsay and *J. J. Walton* for respondent.

John Burnett and *L. Flinn* for appellant.

THAYER, J.—This appeal is from a judgment of the circuit court for the county of Benton recovered in an action in said court, brought by the respondent against the appellant on account of damages for personal injuries received while a passenger upon the appellant's line of railroad, *en route* from Yaquina City to Corvallis, in said county, alleged to have been occasioned through the appellant's negligence. The case was tried in the circuit court by jury, and resulted in a verdict for the respondent for the sum of \$1650. The grounds of the appeal are alleged errors in the rulings of the court made during the trial, and in the instructions given to the jury. The following is the *gravamen* of the complaint: "That while the plaintiff was such passenger at or near the station called 'The Summit,' on the line of said railroad, a collision occurred by running the engine or locomotive of said railroad against the passenger cars while said passenger cars were detached from said engine or locomotive, and while the said passenger cars were standing on the track of said railroad, with such force that the plaintiff was precipitated forward and thrown down on said cars, whereby the plaintiff was badly wounded, bruised, and injured about her person, and put in imminent danger of her life; and plaintiff was for a long time confined, and unable to attend to her usual business, and is yet, and has sustained permanent injury, and was obliged to, and did, pay large sums of money for doctoring and attendance, to wit, the sum of \$300; that the said collision was caused by the negligence of the defendant and its servants." This was denied by the answer, and the following matter alleged therein: "That on the thirty-first day of August, 1885, near the Summit station, on the railroad mentioned in the complaint, in Benton county, Oregon, the defendant was causing a train of cars to pass over said railroad from Yaquina City to Cor-

vallis, Oregon, upon which train the plaintiff was a passenger, and that at said Summit station said train was halted and stopped for dinner, and that while said train was so stopped and halted to enable the passengers to get dinner at said Summit station, one C. E. Blackburn, who was at said time not in the service or employ of the defendant, wrongfully, and without the authority or consent of said defendant, detached, and caused the locomotive to be detached and uncoupled from the passenger cars, and moved said locomotive along the track some distance from the passenger cars, and that in attempting to return said locomotive to its place and connect the same to the said passenger cars the collision mentioned in the complaint happened, and not otherwise; and that the same happened without the consent or knowledge of the defendant or its servants, or either of them, and that said Blackburn, at said time, was not in the employ of the defendant, and never had been, and that his act in uncoupling said train and separating the locomotive from the passenger cars, and in attempting to return the same to its place, and in causing said collision, was without the knowledge or consent of the defendant, and the same was wrongful on the part of said Blackburn." The answer also alleged that plaintiff contributed to the alleged injury by leaving the cars of defendant while they were stopped, and returning to them while the engine was detached, without the knowledge of the defendant or its servants, and carelessly and negligently entered said cars before she was notified or requested so to do, and before the alleged collision occurred; and by so doing contributed to said injury, and that said alleged injury would not have occurred but for the said carelessness and negligence of said respondent.

This reference to the pleadings shows pretty conclusively that the relevant testimony in the case was confined to narrow limits. The general facts evidently are not controverted. It may reasonably be inferred from the pleadings that the respondent was a passenger upon the appellant's train of cars as alleged in the complaint; that the train stopped near the Summit station upon the line of the road; that the locomotive was there detached and run out on the line of the road to a point beyond the Summit towards Corvallis; was then run back to be coupled to the passenger cars again, and, in the act of effecting such purpose, produced a collision which resulted in the injury of the respondent. It is claimed upon the part of the appellant, as will be seen from the portion of its answer to which reference has been made, that it was nowise responsible for the collision mentioned, but that it was produced by the wrongful intermed-

dling of said C. E. Blackburn with the company's locomotive-engine and train of cars. The appellant denies any negligence in the affair, upon the grounds, I suppose, that the act was not its act, but the act of an interloper, with whom the company had no relations whatever. This, and the alleged negligence of the respondent, seem to be the main grounds of the defence in the action. Both of the grounds were mainly matters of fact for the jury to determine. If the injury was occasioned by the wrongful acts of a stranger, the railroad company ought not to be held responsible for it, unless the company in some way countenanced the acts so as to make them its own. There was evidence in the case tending to show that said Blackburn was employed as engineer, and sent out on the train upon which the accident occurred by one Fordyce, to learn the road between Yaquina City and the Summit.

Charles Meeker, the locomotive engineer on the train, testified that he got orders from the train dispatcher, Mr. Fordyce, to take Blackburn upon the engine "to learn him" the road between the two places; and Facts. Blackburn himself swore that he was sent out by Mr. Fordyce from Yaquina City as engineer at said time; that he supposed Mr. Fordyce to be acting as train dispatcher, or superintendent, or something of that kind, he did not know what; that at the time the instructions were given, Fordyce was at Yaquina City in the railroad office; that a great many persons were present at the time buying tickets; that Meeker was there. The instructions were that Blackburn should get on the engine No. 2, with Meeker, the engineer, and proceed to the Summit; that upon arriving at the Summit he was to take charge of No. 2 engine, and work with it there until Meeker returned from Corvallis; Meeker was to take another engine run by a man by the name of Brown, and proceed to Corvallis; that when he, Blackburn, arrived at the Summit, he would receive his running-orders; that after receiving from Fordyce the instructions, he got on the engine with Meeker. He further testified, in substance, that after getting upon the engine they left Yaquina, and ran along with the train to Chitwood water-tank; that after leaving there, Meeker asked him to take the engine and run it; that he took hold of the engine, and Meeker went back on the train among the passengers; that after running along to within two or three miles of Nashville, Meeker came back, and he, Blackburn, asked him to take the engine; the former said, "No, you are doing well; go ahead." Meeker finally resumed running the train, and after they got to the Summit there was some conversation about dinner, between Meeker, the fire-

man, and some one; that Meeker got off the car and mingled with the people, and he, Blackburn, remained on the engine some time; a few minutes after, a man he thought was Mr. Rader came upon the engine, and a little later the brakeman also came to the engine; that one of these men went along the engine, pulled the pin (coupling pin) out, gave witness the signal to go ahead; witness asked him where to, and he said "to get dinner"; witness asked him if it was all right with Charley, referring to Meeker, and he said "Yes, Charley said go along and get dinner." He then came in the engine and passed through the pilot hole, and as he went out he put his foot against the throttle, and opened it; that witness took charge of the engine and went across the Summit for dinner. After dinner the parties started back with the engine to where the train was. The other parties had got aboard before witness did, and the engine was moving back when he returned to it from dinner; that when he got on the engine the fireman had charge of it, and he said, "You take charge of it while I put in some wood." That witness did so, and shut off steam; that they were backing up the engine, and, as customary, the witness turned his back to the throttle to observe his way back; that he saw before going a great ways that the tender brake was not sufficient to hold the engine; that when he shut the steam off, he dropped the lever down into the corner, and controlled the engine with the lever until he got within a short distance of the train; that at times, in going down grade, the fireman would work his brake a little, and that would give the engine a little start, and witness would fetch it up with the lever again; but at no time till near the train, did he have occasion to throw the lever over across the centre; that by bringing the lever up beyond the centre it would have a tendency to keep the engine under control; when near the train, he saw the brakeman had worked round the tender ready to make the coupling; that he called out three cars, or four cars, he did not remember which; the engine was then under control; just as he called "three cars," or "four cars," witness was under the impression that the brake was let off; that at any rate the engine shot right back on him; that any one who could handle an engine knows what that means; that witness did not have the spring down into the notch; that when the engine shot back on him it pulled him down into the corner; that he turned the other way and attempted to throw the lever over on the forward motion, and when he threw the lever up towards the centre the engine was moving very fast; and when he brought the lever to the centre he could not throw it over, and then discovered, through the cylinder cock, that "she" was leaking

steam—could hear it sucking through the cylinder cocks. This narration includes the circumstances immediately preceding the collision. There was a fireman, and, I would infer from the bill of exceptions, two brakemen aboard the engine at the time of the occurrence, though it is not certain that there was more than one of the latter.

Mr. Wallis Nash, a vice-president of the road, was called as a witness on the part of the appellant, and testified that the only one who had power to employ persons was Henry V. Gates; that the extent of Mr. Fordyce's authority was station agent at Yaquina, and that he was also acting under Gates' authority as telegraph operator in carrying Gates' orders to the trainmen; that he had no other authority whatever over the men, except to execute Mr. Gates' orders.

Mr. Gates was also called as a witness for the appellant, and testified to the same effect, and further testified that Blackburn had no authority to go out on the train at the time referred to. The witness testified upon his cross-examination that Fordyce was the material agent; that as that agent he had charge of all supplies on the road; that he was station agent, and had a station agent's authority; outside of that he had no authority whatever; had no authority to employ any person.

This in effect is all the evidence shown by the bill of exceptions as to Blackburn's connection with the affair, and his relation with the railroad company.

Upon the other ground of defense, the alleged contributory negligence upon the part of the respondent, the evidence contained in the bill of exceptions is very meagre, and no statement is made in the bill of exceptions that there was evidence given upon that point that is not mentioned therein. Roy Rober, a witness on the part of the respondent, testified that he was upon the train at the time of the occurrence. In answer to a question as to what position on the car Mrs. Lakin was sitting at the time, he stated as follows: "I remember distinctly. She was sitting with her back partly to me, and sitting—the seats were with the backs together lengthwise in the cars—nearly to the end; perhaps 18 inches, or perhaps 2 feet, from the end of the car. The benches stand that near to the end. She sat back from the end, I think at least four or five feet, with her back towards the bay from whence she came, her face towards the engine, and the child with its face towards the engine, and with its arms probably over the seat, and with its feet upon the seat, and in that position when it struck; because I noticed the engine when it struck, and she was thrown from

No contributory negligence shown.

there between the cars." The bill of exceptions contains the following : " The testimony in this case, in addition to that hereinbefore mentioned, tended to show that when the train stopped for dinner at the Summit a portion of the passengers remained on the cars to eat lunch; that Mrs. Lakin so remained on the cars; that soon after the cars stopped she went off to take her little girl to a water-closet, and she was off about five minutes, and then she returned, and was eating her lunch when the accident occurred." The other evidence in the case showed that when the engine struck against the cars it was moving very fast, and that the concussion was severe. I do not see anything in the bill of exceptions that would have warranted the jury in finding that the respondent was guilty of contributory negligence in the affair. It does not even hint at any act or omission upon her part that concurred in producing the injury complained of. She paid her fare to the said company, and took passage upon said train of cars, and was careful and prudent in her conduct, so far as anything to the contrary is shown. Nothing, therefore, can be claimed from that ground of defence.

As to the former ground, the injury being the result of the wrongful act of Blackburn and not from any negligence of the company, very little more can be claimed than from the latter. The evidence referred to tends to show that Blackburn was requested by Mr. Fordyce, the station agent of the company at Yaquina, to go aboard of the train and learn the route preparatory to his taking charge of the engine and operating it as engineer ; that he did so ; went in company with Meeker, the regular engineer, who was directed by said agent to teach him the road; that he was aboard the engine when it was detached from the train; went with it to where the employees of the railroad company took dinner, and returned upon it; that when it started back he was requested by the fireman to take charge of it, which he did, and in connection with the fireman and brakeman endeavored to manage the engine as it was backed down towards the train in order to be coupled onto it. It is conceded on the part of the appellant that Fordyce was in its employ, but it was claimed that the only one who had power to employ persons was Henry V. Gates ; that the extent of Fordyce's authority was that of station agent at Yaquina, and was also acting, under Gates' authority, as telegraph operator in carrying Gates' orders to the trainmen that he had no authority whatever over the men except to execute Mr. Gates' orders. Granting that this was as claimed, and that

**Negligence of
engineer—Em-
ployment—
Scope of au-
thority.**

Mr. Gates had not empowered Mr. Fordyce to employ Blackburn, or to direct Meeker to take him upon said train at the time mentioned, and yet I fail to see how that is to relieve the company from liability. Blackburn was aboard the engine, serving the company at the request, and with the acquiescence, of its servants and agents; and if the accident occurred through his special neglect or want of skill in the management of the engine, which does not appear at all, the company would be just as liable. Every employee of a railroad company is, to a limited extent, its agent; and what difference can it make whether the negligence which occasioned the injury resulted from the negligence or wrong of Blackburn, as *de jure* engineer, or from the negligence or wrong of Fordyce in placing him in the position of engineer? The latter was a regular employee of the company, and deputed to execute the orders of Gates. Blackburn evidently had no reason to believe but that Fordyce had been empowered to employ him, and his going aboard of the engine, and doing what the testimony tended to show he did do, was no intrusion. No one will pretend that it showed him to have been a trespasser in acting the part he did. Whether he was legally employed or not, so long as he acted in subordination to the agents of the company, the liability of the latter to the respondent was not affected. Its obligation to her was to carry her safely and properly; the mode of performance of its duty was through the means of agents and servants; and if it failed to fulfil its obligations in consequence of their wrong, it became responsible for the injury that was thereby occasioned. How is the public to know whether an engineer aboard a train of cars has been legally employed or not? or what difference does it make so long as he is there, acting in such capacity, and the company, through its regular agents and managers, acquiesces in it? The conductor is supposed to have been there, and he is said, by a great many authorities, to be *pro hac vice*, the company. He must have countenanced all that Blackburn did, up to the time of the collision. If the latter had forcibly taken possession of the engine and occasioned the collision, and the agents and employees of the company been unable to prevent it, the latter would not have been liable for the consequences. But no such affair as that is shown by the facts, and we must conclude that the merits of the case are with the respondent, unless error crept into it through the admission of testimony, the rulings at the trial, or in the charge of the court to the jury.

The appellant has assigned numerous grounds of error.

As classified under general heads, they consisted in permitting the respondent, when on the stand as a witness, to describe the condition of the cars upon which the passengers were transported, and the manner in which she was injured; in admitting the testimony of Blackburn as to the boiler leaking steam; and in returning the answer made to the inquiry of the jury, that, "if the locomotive was moved by the servants or agents of the company, whether within the scope of their employment or not, the company is responsible for all their acts." The appellant's counsel claim that the evidence in regard to the condition of the cars, and of the boiler leaking steam, was objectionable on the grounds that it tended to prove negligence on the part of the company in failing to provide suitable means of conveyance of passengers, and safe appliances and machinery, when those matters had not been counted on in the complaint. The allegation in the complaint is, that the collision occurred by running the locomotive against the passenger car; "that said collision was caused by the negligence of the defendant and its servants." It is perhaps questionable whether the respondent had, under that allegation, the right to prove at the trial the unsuitability of the cars used by the appellant to transport passengers, or the defectiveness of the engine or boiler in the particular referred to, as a ground for a recovery in the action. It might reasonably be claimed that, by a fair construction of the complaint, the negligence alleged therein referred to some act or omission of the appellant's servants in the management of the engine the time it was backed down to the passenger cars to be coupled to the train; but there certainly could have been no error in the respondent's describing how the cars were constructed, in order to show the particular manner in which she had received the injury. I cannot see any objection to that, nor how the fact that the passengers were in an open car, with the seats arranged in a particular way, could have prejudiced the appellant with the jury, as its counsel seem to think it did. The respondent knew how the car was arranged when she went into it, and probably long before; and if she thought it was not such a one as the appellant ought to furnish, she would have objected to riding in it. Its defects were visible, if it had defects, and she took the risk incident thereto. The evidence in regard to "the steam escaping" came in incidentally in the testimony of Blackburn, as a part of his narrative of the affair; neither of these matters were sought to be made a ground of negligence, and the court instructed the jury especially not to consider the latter as such. I do not see how anything

Evidence—Respondent's description of cars and manner of injury.

more could reasonably be claimed, and am satisfied that no error is shown from those matters.

The inquiry of the jury, to which the answer before referred to was given by the court, was whether "in case the jury find that the employees of the company, that is the fireman and brakeman, moved, or permitted the engine to be moved, without the consent of the engineer, the company was liable for any damages that might arise from such moving." The answer that the company, under the circumstances, was responsible for all their acts, was correct. The court, however, to make it stronger, probably, included in the answer the words, "whether within the scope of their employment or not." That left the inference that the fireman and brakeman might not have been acting within the scope of their employment, if they moved, or permitted the engine to be moved, without the consent of the engineer. If it were possible that the acts of the fireman and brakeman in the matter referred to could have been without the scope of their employment as it related to the respondent, the instruction would have been erroneous; and it was inaccurate as given under any view. The court, however, was entirely excusable in committing the inaccuracy, as there has been a contrariety of decisions upon the point that are calculated to confuse any one. But for a fireman, brakeman, or any other of the employees of a railroad company, having charge and management of a train of cars employed in transporting passengers from and to given places, to get out of the scope of their employment concerning such passengers, would be to get out of the employment of the company by dissolving their relations to its servants. The error in attempting to excuse common carriers from liability on account of an injury resulting to a passenger has arisen from a misapplication of the old principle that the master is not liable for the malicious acts of his servant. When a servant goes outside of his employment, and wantonly inflicts an injury upon a third party to whom the master owes no duty, it may well be said that the servant was a principal in the affair; that he was acting for himself in that matter, and was not a servant. But where the master obligates himself to transport a person from one place to another safely and properly, and to protect him from injury from any source that human judgment and foresight are capable of providing against, and the master intrusts the performance of the duty he has so undertaken to discharge to his employees, he becomes responsible for their acts, whether negligent or malicious, and they continue in the line of their employment until their relation with

Acts of fireman and brakeman—Scope of employment—Instructions.

the master is dissolved. The specified duty of an employee in such a case may be very limited, but the scope of the employment is as broad as the obligations the master has assumed. The distinction here indicated, as to when the master is liable for the acts of his servant, has often been overlooked by both counsel and courts. The counsel in this case has cited a number of authorities, apparently without having observed it.

In *Jewell v. Railway Co.*, 55 N. H. 84, the first case they cite, the defendants were under no obligations to the plaintiff:

Same—Au-
thorities.

there, the plaintiff went to the defendant's depot to get certain freight, consisting in part of a crate of crockery; it was pointed out to him by Monneghan, the defendant's employee. Two men were at work for Monneghan in the company freight house; assisted the plaintiff to load the freight, except the crate of crockery, upon his wagon. When it came to loading the crate of crockery, one of the men called upon Monneghan to assist in putting it upon the wagon. He did so, and, in loading it, injured the plaintiff in consequence of the crate striking against his shoulder, and for which the action was brought against the company. *Held*, that if the consignee of goods accepts a delivery at a place or in a manner different from what a common carrier is liable by law to deliver them, the business of removing them becomes from that time his business, and the carrier cannot be held liable for the acts or omissions of those employed to do the work. It was upon that principle that the new trial was granted in the case, the trial court having refused an instruction prayed by the defendant's counsel covering it. The gist of the decision is that pointing out the freight to the plaintiff in the freight house, and his accepting it there, ended the defendant's obligation to the consignee, and what Monneghan and the other persons did in loading it upon the plaintiff's wagon was beyond the scope of their employment, simply because it was an act the company had not contracted to do. Its service was completed when the freight was delivered, either in the freight house or elsewhere, and when its employee undertook to do something beyond that, he got outside of the course of his employment.

In the case of *Railroad Co. v. Wetmore*, 19 Ohio St. 110, cited by appellant's counsel, the distinction in question was only referred to. The court said, at page 133 of the case, that "in order to withdraw this case from the operation of the general rule, and hold the company responsible on the ground of its contract with the plaintiff as a passenger, it is necessary to maintain that the company, in requiring the plaintiff to apply to its servant for the purpose, and as the only means of getting his baggage checked, impliedly under-

took to vouch for and warrant the good conduct of the servant towards the plaintiff while the two were engaged in transacting the business. Whether this position is tenable, we do not find it necessary in the decision of the case now before us to express a definite opinion. The case was not tried on this theory in the court below, nor has this phase of the question been argued here. But if such rule of liability could be applied against the company, it would necessarily impose the reciprocal duty upon the plaintiff to so demean himself towards the servant as not, by misbehavior, to provoke a personal quarrel between them." The court concluded that "the evidence of the company on the trial tended strongly to prove that the plaintiff, by his importunate conduct and abusive language towards the servant, provoked a personal quarrel between them; that the assault was the result of this quarrel, and that the blow inflicted by the servant was an act of personal resentment." And that "if these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of the service for which he was engaged by the master."

Isaac v. Railway Co., 12 Daly, 340, another case cited, seems to be in line with that of *Railroad Co. v. Wetmore*, though I believe the distinction alluded to was there entirely overlooked, although the defendant in the case was under an obligation to the plaintiff, she being a passenger upon the street railroad car, and its servant, the conductor thereof, having thrown her from the car with great violence out upon the pavement, whereby she was seriously injured. The other authorities cited by said counsel are cases where the master owed no special duty to the party injured by the servant's act. The decisions in the Ohio and New York cases above referred to would have been entirely sound, no doubt, if the obligation the defendant in each of the cases was under to the plaintiff therein, before suggested, had not existed. But in view of such obligations I am unable to discover how a common carrier of passengers is exempted from liability for the misuse occasioned by the parties designated by the carrier to perform the latter's duty in transporting such passengers, whether it result from the malice and violence, or ordinary negligence, of such parties.

I indorse fully the language of Chief Justice Ryan, in *Craker v. Railway Co.*, 36 Wis. 669, where, after referring to the liability of principals for wilful and malicious acts of agents, he says: "But we need not pursue the subject, for, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the prin-

principal to third persons as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard or in the malicious violation of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third person without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and he appoint an agent to furnish it, and the agent, of malice, furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it."

The same doctrine is maintained in *Goddard v. Railway*, 57 Me. 202, and is there supported by citations to a large number of authorities; and this court, in *Sullivan v. Railway & Nav. Co.*, 12 Or. 405; s. c., 21 Am. & Eng. R. R. Cas. 391, indorsed it. The fireman and brakeman, if they moved the engine, or permitted it to be moved, without the consent of the engineer, were still within the scope of their employment. At least the company was responsible for any consequences attending the affair, occasioned by their negligence or that of any person permitted to be on the engine assisting in its management; and therefore the remark of the judge, "whether within the scope of their employment or not," could have done no injury.

As to whether there was negligence or not in detaching the engine from the train, running it over the Summit, and backing it down to the train in the manner shown by the testimony given at the trial, was a question for the jury. Under the facts shown, I think the jury were authorized in finding negligence, and that the judgment appealed from should be affirmed.

Having been of counsel, STRAHAN, J., took no part in the hearing or deliberations in this case.

PETITION FOR REHEARING.

(November 10, 1887.)

THAYER, J.—I have examined the petition for a rehearing filed herein, and am unable to discover therefrom any good reason for changing the former opinion expressed in this case. The petition, in fact, is but an extended argument upon the questions already considered, and I would deem it unnecessary to indicate any further view, were it not for certain language which appears in the petition of which the following is a copy: "If the principles are to be applied to the extent indicated in the opinion, they carry the law of agency to the extent not heretofore enforced or declared in any case within our knowledge, and which as it seems to us must tend to a very great extent to render the transactions of business by means of agents impracticable, for the reason that under the doctrine of this case the master or principal is rendered powerless, he is at the mercy of his employees who may as his agent, but without his authority, or knowledge, or consent, by leaving the line of their employment, do wrongful acts enough to bring bankruptcy and ruin to the master or principal."

Petition for rehearing.

I supposed the position of the court would be understood, from what has already been announced as its views upon that question; but counsel seem to overlook the principle upon which the opinion was based. It is simply this: A common carrier of passengers undertakes to transport them safely, and with reasonable dispatch. That is an obligation the common carrier takes upon himself, or itself, when he or it engages to carry passengers for hire. If that obligation is broken, the carrier is liable, whether the breach results from the negligence, misconduct, or malice of the persons the carrier employs to perform the obligation.

Obligations of carriers of passengers.

The question whether the agent kept within the line of his duty, or got out of it, is unimportant. A conductor, brakeman, or other employee upon a passenger train of cars, is employed to perform certain duties; but whether he keep within the line of his duty or not, has nothing to do with the company's liability to a passenger, if injured through the fault of such employee.

A railroad engineer would have no right to get drunk, or

act recklessly, or maliciously, while running a train of cars. If he did so, he might be said, in one sense, to be outside of his line of duty; but who would undertake to exonerate the company from liability for an injury to a passenger occasioned by any of such acts? A person who takes passage upon a train of cars contracts with the company that he shall receive good treatment while in transit. Under such circumstances, could it reasonably be contended that the company would not be liable, if its agents or servants were wantonly to inflict abuse upon such passenger? No court would stop to inquire whether the agent or employee was outside of his line of duty or not; it would make no difference whether he acted from honest motives or maliciously; the effect would be the same. The obligation of the company would be violated, and its liability attach. So with the obligation to transport passengers safely. It may be violated as well by the malicious acts as the negligent acts of its employees, and the question of their being within or beyond their line of duty in such cases cannot be considered.

The rule is different, of course, where the act of the agent affects a party to whom the company owes no duty. There the character of the act, as to its being negligent or malicious, becomes important. That a master is not ordinarily liable for the malicious acts of his servant is an old and well-settled principle, and the reason of the rule is that the servant becomes a principal when he commits such acts; he is then outside of his line of duty. But in a case like the one under consideration, the master cannot shield himself from liability upon any such grounds. The liability there, arises out of another principle, which was attempted to be explained in the opinion delivered.

The exception to the proof as to the kind of car the respondent was in when the collision occurred between the cars and engine is insisted upon as error with more pertinacity than consideration. The point is merely technical at most. If the position of the appellant's counsel were correct, they have very little to complain about. They were certainly not taken by surprise in the proof; it was not a matter that could be sprung upon them and they not prepared to meet. The proof related to an open, visible, notorious fact, which they were as well prepared to disprove, no doubt, at one time as another. How could it have been important to apprise the appellant that the respondent would prove the style and arrangement of the car? The former knew that was an open car, that the seats were arranged lengthwise and that the ends were entirely

Injuries to
passengers
through fault
of employees.

Proof of kind
of car respond-
ent was in.

open ; or if that were not the fact, they could have disproved it by its employees who had control of the car, and by hundreds of others upon very short notice. The fact was of such a character that the appellant could not have been misled in consequence of the proof. The counsel for the appellant seem to think that it was entitled to all the immunity of a prisoner, under indictment. The claim that this proof tended to establish another and different ground of liability, to my mind, is wholly absurd. Proving the mode in which the car was constructed established no liability. The appellant had a legal right to run cars of that character upon its road, and the respondent took all the risk incident thereto when she engaged passage upon them. It is not like a case where cars are defective, and occasion a casualty in consequence thereof ; they were perfect as designed. If the respondent had engaged passage in a closed car, an ordinary passenger coach, and the company had placed her in an open flat car, there might have been grounds for liability in case of accident. Using such kind of car under the circumstances this one was employed did not, however, create any liability, and the fact as to its mode of construction and arrangement was only important as an effect, and not as a cause. Its proof was competent in order to show how the injury was received, and to disprove the charge of contributory negligence, and it evidently was admitted upon that ground.

There are no sufficient grounds for a rehearing, and the motion will therefore be denied.

ROBOSTELLI

v.

NEW YORK, NEW HAVEN AND HARTFORD R. CO.

(*U. S. Circuit Court, S. D. New York, January 31, 1888.*)

Passenger—Commutation Ticket—Validity—Knowledge.—If a person, in good faith, presents a commutation ticket, which was issued to another, and is not transferable, and his claim to be carried thereon is recognized, and he is carried as a passenger, he is entitled to the rights of a passenger, i.e., to be carried safely, and to have a secure place to stop and leave the road.

Same—Negligence—Running Train Past Station.—It is negligence to run a train, without warning, at a high rate of speed past a railroad station at which another train has stopped and is discharging passengers, many

of whom must cross the track upon which the train is running in order to reach their homes.

Same—Contributory Negligence—Crossing Track.—A passenger, upon leaving the train at the station, attempted to cross an adjoining track which passengers had been accustomed to cross without objection, and was struck by or drawn into a train which was travelling at a high rate of speed. *Held*, that the question whether he was in the exercise of the care of a prudent man under the circumstances, was for the jury to determine.

Same—Instruction—Request by Juror.—In an action for damages for the death of a passenger killed by a passing train while crossing an adjoining track, after the instructions to the jury were concluded, a juror asked whether the fact that the passenger had previously got off safely on the same side of the train would give him the right to get off there again, and the court replied that this was left to the jury, *held*, that the answer was not misleading in view of the fact that the jury had been instructed to take the whole situation into consideration in determining whether there was any want of due care on the part of the deceased.

ACTION at law by Maria Robostelli, administratrix of the estate of Joseph Robostelli, deceased, against the New York, New Haven & Hartford R. Co., to recover damages for negligently causing the death of plaintiff's intestate. The jury returned a verdict for the plaintiff, and defendant thereupon moved for a new trial.

Charles H. Noxon for plaintiff.

Robert D. Benedict and *Henry W. Taft* for defendant.

WHEELER, J.—This suit is brought upon a statute of the State of New York to recover damages for causing the death of the plaintiff's intestate. Code Civil Proc. §1902. It has now been heard on motion of the defendant for a new trial.

The defendant's railroad has two tracks. There was also a track turning off southwardly towards Harlem river, at New Rochelle Junction, with a platform between that
Facts. and the other tracks. Owen Roehrs lived at West New Rochelle, a village on the opposite side of the main tracks, and had a house there, and a commutation ticket entitling him to ride between New Rochelle and New York, but not transferable. New Rochelle Junction was between New Rochelle and New York. It was on the time-tables as a station to which tickets were sold, and at which some passenger trains stopped. Passengers going to West New Rochelle on trains stopping at the junction were in the habit of getting off on the side opposite to the platform, and going across the other track, without objection, to a gate, and to that village. The platform was used principally for passengers of the Harlem river branch. The intestate was employed in New York, and bought Roehrs' house at West New Rochelle, and Roehrs told him that he might have his

commutation ticket with the house. He took the ticket and moved into the house, and, on two Saturday evenings, rode from New York to the junction on the train stopping there at that time of the evening, on that commutation ticket, about which the conductor made no question, got off the train with others on the side opposite the platform, and went across the other track to the gate, and to his house. On the next Saturday evening, October 15, 1886, he took the same train, leaving New York at nine minutes past five, and rode on the commutation ticket, without objection, to the junction, in company with another man going to West New Rochelle. The train arrived at the junction a little after the evening began to be dark. There was no light on the platform. The name of the station was called out, and the conductor got out on the platform with his lantern. The intestate followed his companion to the rear platform of the car in which they had been riding, his companion stepped off on the side opposite the platform, and onto the other track, and, seeing a train coming, sprang across, and called to the intestate to stop. The water-boy on the platform of the next car noticed this call, and, although he did not see the train, spoke to the intestate to come that way. He did not appear to hear or to understand either, and stepped off as the train went by at a speed of 25 or 30 miles an hour, and was struck by, or drawn into, the train, and instantly killed.

The defendant requested that a verdict be directed in its favor, on the ground that the intestate was not entitled to the rights of a passenger; that there was no evidence of any negligence or wrongful act for which the defendant was liable; and that the evidence showed that he was guilty of contributory negligence. This request was denied, and the jury instructed that if he, in good faith, presented the commutation ticket for his passage, and his claim was recognized, and he was carried as a passenger upon it, he was entitled to the rights of a passenger to be carried safely, and to have a secure place to stop at and leave the road; but that if he was endeavoring to pass himself off to the conductor as Roehrs, and to get carried for nothing, when he knew he was not entitled to ride in that manner, the defendant was under no obligation to carry him, or to afford him a chance to stop safely, otherwise than by not exposing him to dangers occasioned by gross negligence; that if any want of ordinary care on his part contributed to produce his death, the plaintiff was not entitled to a verdict in any event; but if not, and it was gross negligence or reckless carelessness to run the other train past this one at such high speed when this one was stopped for passengers to get

Instructions
given and re-
quested.

off, and who might get off onto the track on which that train was running, the plaintiff would be entitled to a verdict whether he was entitled to the rights of a passenger or not; and if not, and he was entitled to the rights of a passenger, and it was not reasonably safe, in view of the whole situation, to run the other train by at that speed, the plaintiff would be entitled to a verdict. After the instructions to the jury were concluded, a juror asked whether that he had got off safely on that side before would give him the right to get off there again, to which answer was made that this was all left to the jury.

The principal grounds upon which this motion is urged are the rulings in respect to the commutation ticket, the refusal to direct a verdict for contributory negligence, and the

Effect of plaintiff riding on ticket issued to another. ruling in respect to a safe place to get off the train and leave the road. It is assumed in argument that the presentation of the ticket was itself such a fraud as to make him a trespasser, or an intruder, and that his motive would not make any difference with its legal effect. There are cases

where it is held that the moral intentions make no difference; but, so far as observed, they are not cases where the question of becoming an ordinary passenger was involved alone, but where the question of liability with respect to other relations was also concerned. In *Railroad Co. v. Beggs*, 85 Ill. 80, the plaintiff was riding on a free pass issued to another person; in *Railroad Co. v. Nichols*, 8 Kan. 505, the plaintiff was allowed to ride in the baggage car as an express messenger when he was not such; in *Railroad Co. v. Moore*, 49 Tex. 31, the person was riding on a freight train; so in *Eaton v. Railroad Co.*, 57 N. Y. 382. But here, the intestate was in the passenger car, on a passenger train, claiming to be a passenger on the commutation ticket, and his claim was recognized. The conductor was a witness, and did not claim that he thought the intestate was Roehrs, nor that he did not know either of them. The conductor had charge of requiring tickets, and implied authority to accept or reject persons as passengers on tickets presented by them. Railway Accident Law, § 215. In *Railway Co. v. Harrison*, 10 Exch. 376, there was a commutation ticket issued to a newspaper for certain reporters, naming them, and not transferable. A reporter on the same paper, not of those named; was permitted to ride upon it. Whether he was a passenger or a trespasser was left to the jury. This was held to be correct. Coleridge, J., said there "was evidence that would make it wrong to say the plaintiff was a trespasser in the cars." In *Austin v. Railway Co.*, L. R. 2 Q. B. 442, children under three years of age were

carried free, and over three and under twelve for half fare. The plaintiff was three years and two months old, and was carried in his mother's arms. She bought a ticket for herself, but not for him. No questions were asked by the ticket agent or conductor. His leg was broken, and the question arose whether the defendant owed him any duty. It was said by Blackburn, J.:

"The fact of his being a passenger casts a duty on the company to carry him safely. If there had been fraud on the part of the plaintiff, or he had been taken into the train without defendant's authority, no such duty would arise."

The claim of the right to ride, made in good faith, with acquiescence of the conductor in the claim, would seem to amount to a good contract of carriage. Railway Accident Law, § 215. These authorities and considerations appear to warrant submitting the question of good faith, in claiming the right to ride on the commutation ticket, to the jury.

As the jury may not have found that the intestate made the claim in good faith, the verdict may rest upon the finding of gross negligence or carelessness in so running the other train past the one he was leaving as to make the leaving it dangerous. That it was the duty of the defendant to provide safe means of exit from the train for passengers, is not disputed.

**Dangerous
egress—Run-
ning train past
station held
negligent.**

The exit was not safe if so contrived as to lead the passengers into danger. Passengers for West New Rochelle, stopping at this station, could not reach there from the train on the track which this train was on without crossing the other track. They could get off onto the platform, and go past the end of the train and cross, or get directly down on the other side and cross. If they should get off onto the platform, and wait for the train to leave, they would still have to cross; and there was no shelter there or other conveniences for waiting. The train could not pass on the other track without the liability of encountering these passengers, and if it passed while the train was standing, and the passengers alighting and leaving, it would be quite likely to encounter them when attempting to cross by the rear of the other train, or from its platforms, while the cars would obstruct their view. No whistle was blown to give warning of the approach of the train, which was behind time, and not expected at that hour. To run a train at such high speed past another discharging passengers likely to step directly into its path, without warning, would seem to be evidence not only of neglect of common care, but of recklessness and gross negligence.

A remaining question, and the one most relied upon in be-

half of the defendant, is whether the evidence was such, with reference to the exercise of due care by the intestate, as to warrant submitting it to the jury. The defendant does not complain about the manner of its submission, but insists that there was no question upon it but that the verdict should be for the defendant. In *Railroad Co. v. Mares*, 8 Sup. Ct. Rep. 321, the court below had instructed the jury that the burden of proving contributory negligence was on the defendant; and this ruling was approved. In this case the burden was left upon the plaintiff, as to the whole, by requiring her to establish that her intestate was killed by the fault of the defendant, without any contributory fault of his own. In either view, however, the plaintiff could not rightfully recover if the contributory negligence appeared, whether from the evidence of the defendant or that of the plaintiff. There are many cases where it has been held that to go within harmful reach of a moving railroad train when seeing it, or without looking, is of itself such negligence as to preclude recovery for any injury therefrom received. Among them are *Railroad Co. v. Heilman*, 49 Pa. St. 60; *Same v. Beale*, 73 Pa. St. 506; *Railroad Co. v. Houston*, 95 U. S. 697,—which, with some others, are relied upon by the defendant here. This is unquestionable if that is all; but there may be other circumstances to control, or entitled to weight, to the contrary. In *Railway Co. v. Slatery*, L. R. 3 App. 1155, the plaintiff's intestate crossed the track, where there was a sign up giving notice not to cross, but where people were in the habit of crossing, to get a ticket, and, in passing behind a train, which had just come to the station and stopped, onto another track, was struck by a fast train which came from the opposite direction on that track, and which was hid from his view by the other train, and killed. The question whether he was guilty of contributory negligence was submitted to the jury, who found for the plaintiff. The house of lords, on much debate, and with some diversity of opinion, approved of this ruling. Here the plaintiff's intestate was about to leave the train where passengers had been accustomed to without objection. The tracks were only six feet apart, and the projection of the cars beyond the rails would leave but two or three feet of space between those of the passing train and those he was leaving. He was going by way of the rear platform, and the other train was coming from the other way, and the car would hide it from his view until he had descended the steps far enough to see past the end of the car, and he was about at that point when the train rushed by. Whether he had got so far before he could see it that he could not stop, or was drawn into it

by the effect of its motion in the air, or kept along towards it after he saw it, or might have seen it, is not clear. The natural instinct of intelligent beings to avoid harm would be some evidence that he did not voluntarily go into the reach of it, after seeing it, to receive injury from it; and the fact that passengers were accustomed to go that way, and he had safely done so before, may have furnished just ground for his undertaking to go that way again. There were questions of fact presented which must be decided by drawing inferences from the circumstances to determine how far he had got, and what he was doing about taking care of himself, when he was struck. If he was led to take that way to leave the train by the situation of the platform and the usual route to the gate, and thence to the village, and was struck by, or drawn into, the train before he had a chance to look, or while about to look, he might not be wanting in the exercise of the care of a prudent man under the circumstances. The plaintiff had the right to have all these questions of fact passed upon by the jury. The right was guaranteed to her by the supreme law of the land in the eighth amendment to the constitution. And this right involved, not only the exercise of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established. *Mangam v. Railroad Co.*, 38 N. Y. 455; *Patterson v. Wallace*, 1 McQ. 748; *Railroad Co. v. Stout*, 17 Wall. 657.

The answer to the juror's inquiry is argued to have been misleading. This argument might be well founded if the answer had been all the instruction there was on the subject. But instructions had been given to take the whole situation, as found to exist, into consideration to determine whether there was any want of due care in taking the way which the intestate took to leave the train. The answer merely reminded the jury that the circumstance inquired about was to be considered with the others. Giving this answer would not appear to make necessary going over the whole again.

Let judgment be entered on the verdict.

Injury to Passenger Taking or Leaving a Train.—See note, 30 Am. & Eng. R. R. Cas. 555; *Brassell v. New York, etc., R. Co.*, and note, 3 Am. & Eng. R. R. Cas. 380-384.

HILL

v.

NINTH AVENUE STREET R. Co.

(109 N. Y., 239.)

Passenger—Street Car—Negligence—Province of Jury.—Testimony in an action to recover damages for injuries sustained by plaintiff while a passenger upon a street car, that the car was being driven with unusual speed, and was suddenly struck by the pole or shaft of truck which penetrated through the front panels of the car with sufficient force to throw the plaintiff from his seat and inflict serious bodily injuries, is sufficient to raise a presumption that the car was driven negligently, and to raise a question for the determination of the jury.

APPEAL from General Term of the Court of Common Pleas for the City and County of New York.

Action by Adelia A. Hill against the Ninth Avenue Street Car R. Co. for damages for personal injuries received by plaintiff while a passenger upon a car belonging to defendant. The trial court dismissed the action at the close of plaintiff's evidence, on the ground that no negligence had been shown on the part of the defendant. The plaintiff appeals from a judgment of the general term confirming the dismissal. The facts sufficiently appear in the opinion.

Jerolman & Arrowsmith for appellant.

John M. Scribner for respondent.

FINCH, J.—We think that the plaintiff was improperly nonsuited. Her proof showed that while riding in a Ninth Avenue street car, in the city of New York, she observed

Facts. that it was being driven with unusual speed, which she estimated to be about double the ordinary rate, and was suddenly struck by the pole or shaft of a truck which penetrated through the front panels of the car, and with sufficient remaining force to throw her from her seat, and inflict serious bodily injuries. Of course, she could see nothing, and know nothing of what was transpiring outside; but what occurred was enough to call for an explanation, and, in its absence, to warrant an inference that the driving of the car was in some manner negligent. The speed with which he was going, taken in connection with the circumstances of the accident, indicates that with proper care the injury might have been avoided, and, at all events, renders it impossible to say, as matter of law, that there was no evidence of negligence on the part of the car

Not proper to grant nonsuit.

driver. The collision may have been wholly due to the careless management of the truck, but it is not a reasonable and natural inference that a passenger in a street car can be thrown from her seat by the shaft of a truck piercing through the front of the car without some carelessness on the part of the driver; and when it is shown that he was driving at an unusual rate of speed, that becomes, inferentially, one cause or occasion of the accident, and calls for an explanation. The inference is not unnatural that if the driver had been going at an ordinary and prudent rate of speed the accident might have been avoided or mitigated, whatever the negligence of the truckman. Enough was proved to raise a question for the jury.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur.

Injuries to Street Car Passengers by Collisions with Other Vehicles.—In *Potts v. Chicago City R. Co.*, 33 Fed. Rep. 610, the plaintiff, who was a passenger on one of defendant's cable trains, was injured by being struck by the shaft of a wagon projected into the car. His view of the sides of the streets, and knowledge of what was going on, was prevented by the curtains being down to keep out the rain. The court instructed the jury that "if necessity existed, on account of the rain, to drop the curtains, then the act of putting them down so that passengers should not be exposed to the storm was entirely proper, and, under such circumstances, negligence would not be imputable to the defendant on account of that act, even though it prevented the passengers from having a view of the sides of the streets." The jury were also instructed that defendant's liability depended upon whether the actions of the horse before the grip car passed him were such as should reasonably have excited apprehensions of a collision in the mind of the grip man. See also *Federal St., etc., R. Co. v. Gibson*, 11 Am. & Eng. R. R. Cas. 142; *Tompkins v. Clay St. Hill R. Co.*, 18 Ib. 144; *Wood v. Detroit City St. R. Co.*, 19 Ib. 129; *Thirteenth, etc., St. Pass. R. Co. v. Baudron*, 2 Ib. 30.

BREEN

v.

NEW YORK CENTRAL AND HUDSON RIVER R. CO.

(109 N. Y., 297.)

Passengers—Personal Injuries—Presumption of Negligence—Sufficiency of Evidence.—Testimony that a passenger was sitting in a railroad car by a window, that his arm rested upon the sill, not extending outside the car window, and that his arm was struck by some substance from a passing freight train, is sufficient to raise a presumption of want of proper care on

the part of the company, and to cast upon the company the burden of disproving it, and in the absence of any explanation by the company a verdict for the plaintiff will be sustained.

APPEAL from the General Term of the Supreme Court for the Third Department.

Action by Matthew D. Breen against the New York Central & Hudson River R. Co., to recover damages for personal injuries received while travelling upon a train belonging to the defendant. The jury rendered a verdict for the plaintiff for \$6000. The defendant appeals from a judgment of the general term affirming the judgment of the trial court.

Hamilton Harris for appellant.

E. Countryman for respondent.

DANFORTH, J.—The learned counsel for the appellant asks for a reversal of the judgment and a new trial, upon two grounds: First, that the injury to the plaintiff was caused by his own negligence; and second, that the defendant, on the occasion in question, was free from negligence. The jury had both propositions before them, after instructions from the court, to which no objection is now made; and the general term was of opinion that the case was properly submitted to them. The judgment must stand, therefore, if there was evidence proper for the consideration of the jury, and sufficient in some reasonable view to induce the verdict. The plaintiff, a passenger on defendant's road, was entitled to be carried safely, so far as that could be effected by reasonable care on its part in the conduct of its business. The complaint is that while proceeding on his journey from Hudson northerly to Albany, he "was struck upon the left arm by a portion of a car door or other part of a freight train running on the defendant's road in an opposite direction," and seriously injured. He was at the time sitting by a window, his arm resting upon its sill. Whether it protruded beyond the sill and outside the car was a question upon the trial, and given to the jury, with directions to find a verdict for the defendant if that question was answered by them in the affirmative. Their verdict in favor of the plaintiff shows that in their opinion the plaintiff was wholly within the car. There is evidence to that effect. The plaintiff says, in one hand he had a paper, in the other a cigar. His arm rested on the window-sill. The window was raised, but "could have fallen down without touching my arm;" at that moment a freight train was passing by, "and something on the freight train struck my arm, and smashed it." The conductor came in and said he

Grounds for
new trial.

Facts.

was on the next car, and he thought there was some accident when the lever to stop the train was pulled by the brakeman. One S., also a passenger, sitting near and behind the plaintiff, described his position, and said on cross-examination by defendant's counsel, "I think if the window had come down it would not have hit his arm." Just the end of the arm rested on the sill." Another passenger, one W., giving a somewhat different account of the construction of the window casing, gives evidence in corroboration of the plaintiff's assertion that his arm was inside, and not outside, the car window. The freight train, as it passed Castleton, shortly before meeting the passenger train, was observed by one Simon, who testified that "there was a door swinging from a car, just as quick as a pigeon, up and down;" this was on the side of the freight car opposite the side of the car at which plaintiff sat. The evidence tended to prove that this swinging door caused the injury. The conductor of the passenger train formed the opinion at once that the cause of the injury was from the freight train, and directed the agent at Castleton to telegraph its conductor "that there was something on that train that struck my train," and he so telegraphed. It does not appear that the conductor of the freight train responded. He was not a witness on that trial; nor were any of the defendant's employees upon that train called to testify in regard to it; nor was there evidence to contradict the positive testimony of the plaintiff's witness as to the condition of the door and its dangerous operations. That it or some other hard substance from the freight car was doing harm is also established by evidence that the car in which the plaintiff sat was scratched and bruised upon the outside; that it was indented inside on the window casing by which he sat; and other cars in the train showed the result of the collision by glass broken from a window, and manifest abrasions and bruises upon the sides. The freight car was in bad condition from the failure of the defendant to keep it in repair, and it is but just that the defendant should be held accountable for a negligence which has been followed by such an accident. Measurement of the window-sill, and opinions as to what could or might have been done upon such a surface, did not amount to demonstration, and were not conclusive. The jury were not bound so to construe that evidence as to discredit and reject that given by the plaintiff. It is for the public interest that persons should be enabled to travel safely over a road operated for public use, and without danger from accidents of this kind; but the defendant is not an insurer, and, as its learned counsel contends, the mere happening of an accident will not in all cases warrant a recovery by one receiving injury.

Verdict justified by evidence.

There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part. The case of *Holbrook v. Railroad Co.*, 12 N. Y. 236, is to that effect. Its facts were quite like those now under consideration, and the principle there stated, that the presumption of want of proper care on the part of the company may arise from circumstances attending the injury, and so cast upon the defendant the burden of disproving it, applies here. No explanation was given by the defendant, and the conclusion reached by the jury was, upon both branches of the controversy, justified by the evidence. We agree with the general term as to the deductions fairly arising from the evidence, and think its judgment should be affirmed.

All concur, except PECKHAM, J., not sitting.

Injury to Passengers Riding with Arm Resting on Window Sill.—See *Halahan v. New York, etc., R. Co.*, 26 Am. & Eng. R. R. Cas. 169; *Farlow v. Kelly*, 11 Ib. 104; *Germantown Pass. R. Co. v. Brophy*, 16 Ib. 361; *Dun v. Seaboard, etc., R. Co.*, 16 Ib. 363.

BLACK

v.

BROOKLYN CITY R. CO.

(108 N. Y., 640.)

Passenger—Personal Injuries—Street Car—Erroneous Instruction.—In an action to recover damages for personal injuries in which it was alleged that the plaintiff while attempting to enter one of defendant's "down-cars," and actually being on one of the steps of its platform, was thrown from it upon the street, and in consequence of the negligence of defendant's servants, in both the "down-car" and a passing "up-car," was severely injured by collision with the "up-car," a judgment for the plaintiff will be reversed if the trial judge, while instructing the jury, correctly as to the negligence of defendant's servants upon the "down car," instructs the jury to take into consideration the conduct of the driver of the "up-car," and there is no testimony of any negligence upon his part, and it does not appear from the verdict upon which charge the jury passed their findings.

APPEAL from the General Term of the Supreme Court,
Second Department.

Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. A verdict was rendered for the plaintiff and judgment entered thereon by the trial court. Defendant appeals from the judgment of the general term affirming. The facts are stated in the opinion.

Morris & Pearsall for appellant.

E. B. Converse for respondent.

DANFORTH, J.—the defendant was incorporated for the business of owning and operating horse cars for the carriage of passengers for hire. The plaintiff alleges that while lawfully attempting as an intending passenger to get upon one of the defendant's "down-cars," and actually being on one of the steps to its platform, he was thrown from it toward the street, and in that way and by collision with another, or "up-car" of the defendant, moving in the opposite direction, was severely injured. Concerning these alleged facts there is no doubt. Facts.

The defendant, by its answer and evidence, raises two questions:

1. Whether the negligence of its servant caused the injury;
2. Whether the plaintiff contributed to it.

It appears that the plaintiff in due season signalled the approaching or "down-car," and it stopped; that as he was getting on board, having one foot on the lower step, the car, on the signal of the conductor, was suddenly started. His further ascent was thus interrupted, and by the rapid motion of the car he lost his foothold and was thrown off. He shows that the platform was crowded, and that by reason of the sudden shock he was unable to reach it with either foot or get hold of the hand rail. Whether by either of those circumstances—the condition of the platform, his omission to take the rail, or enter upon the platform—he was in fault or acted negligently, was submitted to the jury and, as their verdict shows, was answered in his favor. Jury find plaintiff not negligent.

The proposition depended upon conflicting evidence, and was therefore a question of fact, as was also the other, viz.: the negligence of the defendant's servant on that car, and by the opinion of the jury this court is bound. *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135; *Hayes v. Forty-second St., etc., R. Co.*, 97 N. Y. 259.

It was undoubtedly the duty of the defendant, in the exercise of its franchise, to offer to intending passengers a reasonable opportunity safely to board their cars. The charge did not go further; and the evidence warranted a conclusion that such care was not exercised toward the plaintiff, and that the

plaintiff himself was not in fault. The trial judge, however, called the attention of the jury to the plaintiff's allegation in relation to the conduct of the servants in charge of the "up-car," and refused to charge as requested by defendant's counsel: "That negligence could not be predicated on anything the driver of that car did or omitted to do." Upon this refusal the appellant alleges error. The learned judge said, "As to the up-car, the only allegation of negligence concerning the management of that vehicle is that the driver did not perceive, when he ought to have perceived, the plaintiff falling from the car that was coming down," and then said: "If the driver fulfilled the duty which was incumbent upon him, to keep a vigilant watch on his team and of the road ahead, so as to avoid injuring anyone, he performed his whole duty," adding: "The driver himself tells you that he was looking straight ahead at his team; it is for you to say whether, under the circumstances, if the driver of the up-car was doing that, he did not do his whole duty."

We find no evidence as to the conduct of this driver which would permit any other conclusion so far as his duty to the plaintiff is concerned. There is indeed testimony that his way, being blocked by a coach intruding upon the track, the driver of the up-car was speaking to or chaffing with its master at the very moment of or just before the accident; but we find no connection between that circumstance and the plaintiff's injuries. It does not appear to have affected his management of the car, nor that the management was in any respect other than circumstances in which he was placed required. The complaint, however, alleged negligence in the conduct of the up-car as well as negligence in the management of the down-car. Both charges were submitted to the jury, the last, as we have said, properly; the other, in respect to the "up-car," we think improperly, it having no fact for its support; and, as we cannot tell on which alternative of the charge the jury founded their verdict, we are of opinion it cannot be supported.

The judgment should therefore be reversed and a new trial granted, with costs to abide the event.

All concur.

TOPEKA CITY R. CO.

v.

HIGGS.

(Kansas Supreme Court, January 7, 1888.)

Passengers—Street Railway—Duty of Company—Negligence. — A street-railway company using cars, drawn by horses, upon rails, carrying passengers for hire, are bound to exercise all possible skill, foresight, and care in the running of their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run. "All possible skill and care" implies that every reasonable precaution in the management and operation of street cars be used to prevent injuries to passengers. The phrase means good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. "All possible foresight" means anticipation, if not knowledge, that the operation of street cars will result in danger to passengers, and that there must be some action with reference to the future; a provident care to guard against such occurrences; a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so.

Same—Rule in Kansas—Different Kinds of Vehicles.—This rule applies in this State to all vehicles used to carry passengers for hire, the only difference being in the means and instrumentalities used (these being adapted to the particular mode of conveyance), rather than to the degree in which the preventive means are to be applied. To each and every method of carrying passengers for hire must be applied the greatest skill, care and foresight to which they are in their nature susceptible, to avoid liability for injuries occasioned by their operation. The best effort of the minds directing the operation of horse cars must be diligently applied in devising ways and means to prevent injuries to passengers being carried thereon.

Same—Passengers Carried on Platform—Crowding—Gross Negligence. —When a street-railway company undertake to carry large crowds of people, vastly in excess of the seating capacity of their cars; and permit passengers to ride on the platforms and foot-boards of their cars, without objection, and collect fare from them; stop their cars when in such a crowded condition that no seats are obtainable, and permit persons to get upon them to be carried from place to place; and when the cars are in such a crowded condition, with passengers riding on the foot-boards, the employees of the company run the cars so near the intersection of a switch with the main track that the cars on each cannot pass without injury to passengers,—the company is guilty of gross negligence.

ERROR to District Court, Shawnee County.

Action commenced in the district court of Shawnee county, on the eighteenth November, 1885, by Charles Higgs, against the Topeka City R.Co., for injuries sustained while a passenger on one of the company's cars, by the negligence of the

defendant railway company. Tried at the April term, 1886, to a jury, and a general verdict and judgment for \$200 in favor of Higgs. There was a demurrer to the evidence of the plaintiff overruled. A motion for a new trial was also overruled. It is claimed that the court below erred in not granting a continuance; in admitting certain testimony for the defendant in error; in giving certain instructions asked for by the defendant in error; and in refusing instructions submitted by the plaintiff in error.

The jury, in response to particular questions of fact, submitted by the court at the request of the plaintiff in error, is found as follows: "(1) Was not plaintiff, at the time he got hurt, standing on the outside and side platform of an open car, No. 19, with one arm around a side standard, and the other holding to the seat, or, if not, how and where was he standing? *Answer.* Yes. (2) Was not car No. 19 at a standstill at the time plaintiff got hurt? *A.* No. (3) At the time plaintiff got onto car No. 19 for passage, was there not a seat which the plaintiff could have taken? *A.* No. (4) Was not plaintiff requested by the superintendent of defendant not to get onto the crowded cars in his crippled condition, but to wait, and he, the superintendent, would get him a seat? *A.* Yes. (5) Did not the driver or conductor of car No. 19, after plaintiff got on for passage, at the time of the injury, request the plaintiff to come into the car and take a seat? *A.* No. (6) Had not the plaintiff been hurt about September 2, 1885, by falling from the top of the balustrade of the Valley House to the pavement, and did it not at the time he got hurt on the street car require him to use a crutch and cane; and what was the distance of such fall? *A.* Yes; no; 14 feet two inches. (7) Did not plaintiff, in a crippled condition, using a crutch and cane, go upon car 19 for passage, and of his own motion, knowingly and intentionally, stand on the outside side platform, holding onto the post and seat to enable him to stand? *A.* Yes. (8) What was the distance between cars 3 and 19 at the time and place where plaintiff got hurt? *A.* We cannot arrive at the exact distance. (9) State what accidents had occurred to the plaintiff previous to the injury complained of? *A.* The accident at the Valley House, and the accident when plaintiff's ladder broke, and he fell into an apple tree."

INSTRUCTIONS.

The instructions given, that are complained of, are as follows:

"First. The negligence of an agent or servant of the com-

pany is the negligence of the company. If, therefore, you find from the evidence in this case that the injury to plaintiff was caused by the negligence of the employees of the company, then I instruct you that such negligence of the employee is the negligence of the defendant.

“Second. If you find from the evidence that the plaintiff was injured by a collision between two of defendant’s cars, while a passenger thereon, then I instruct you that the colliding of the cars of defendant is presumptive evidence of negligence on the part of the company.

“Third. Carriers of passengers are bound to exercise all possible skill, foresight, and care, in the running of their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run.

“Fourth. If plaintiff got upon defendant’s car, in company with his cousin, for the purpose of taking passage thereon, and, on account of the crowded condition of the car, plaintiff was unable to procure a seat, and remained standing on the foot-board of the car without any objection from the conductor or other employee of the company, and that while riding at that point he was injured by reason of a collision of defendant’s cars, then I instruct you that the mere fact that plaintiff was riding upon the foot-board of the car will not exonerate defendant from liability.

“Fifth. If plaintiff was on the car, ready and willing to pay his fare when called upon by the conductor, but was injured before being called upon for his fare, then I instruct you that the fact that plaintiff had not paid his fare would not affect his right to recover.

“Sixth. If you find from the evidence that it was customary for the defendant, by its employees, during the crowded seasons, to permit passengers to ride upon the foot-boards of the cars, where plaintiff was riding, without objection, collect fare from them the same as when occupying seats inside the cars, and that plaintiff was riding where it was customary to ride when the car was crowded, without any objection from the conductor or other employee of the company, then I instruct you that the mere fact that plaintiff was riding upon the car at that point will not defeat his right to recover.

“Seventh. Carriers of passengers are required to furnish suitable accommodations to their passengers, in the way of seats; and if they undertake to carry more than they can accommodate with seats, and the passengers are required, and permitted to occupy other portions of the car not furnished with seats, and while in this position an injury occurs to a passenger, then the liability of the company is the same as

though the injury had occurred to the passenger while occupying a seat in the car.

" Eighth. If you find for the plaintiff, then, in determining the amount of your verdict, you may take into consideration the expense of medical attendance and nursing, if any is shown; bodily pain according to the degree and probable duration; bodily injury, taking into account loss of time; the extent and probable duration of the injury; its effect upon the health, mental and physical powers, the capability for labor; in short, the remedy should be commensurate with the injury.

" Ninth. If you believe from the evidence that the plaintiff has sustained a permanent injury, then you should take this into consideration in assessing the amount of his recovery.

" Tenth. The passenger is bound to conduct himself with due and ordinary prudence, such as a careful man would use under the circumstances. He also has a right to assume that the company will run and operate its cars in such a manner that the passengers may not anticipate collisions between the cars of the company.

" Eleventh. The court instructs the jury that the statement of facts, read to you by the defendant of Dr. P. I. Mulvane is to be taken and considered by you as the deposition of Dr. P. I. Mulvane.

" Twelfth. If the jury believe from the evidence that the plaintiff, at the time of receiving the injury complained of, was crippled and had to use a crutch and cane for the purpose of locomotion, and that he of his own motion went to the car, and could have secured a seat, and did not, and stood on the outside of the car, when he was requested by the conductor to take a seat, but refused and failed to do so, then I instruct you that his conduct was negligent under those circumstances, and he cannot recover in this case.

" Thirteenth. The court instructs the jury that they can take into consideration the conduct of the plaintiff; the previous accident which had happened to him; the effect of it upon him at the time of and after the injury complained of in his petition; the fact that he failed to occupy a seat on the car; the fact as to whether he was requested by the conductor to take a seat or not; the fact as to whether or not he was crippled at the time, and in this condition stood upon the step outside the car,—all these facts and circumstances are to be considered, with other facts and circumstances in this case, in determining the weight and credibility of the plaintiff's testimony, as to whether he was negligent under the circumstances, and the extent and character of his injuries.

" Fourteenth. The court instructs the jury that it appears

from the testimony that whatever the injury or its extent now is to the plaintiff, that it is not visible to examination or inspection, and to which, or about which, only the plaintiff can testify, and it is proper to say that under such circumstances it is the duty and province of the jury to more closely scrutinize the testimony in determining whether the plaintiff is now injured or not, than if his injuries appeared to or could be made apparent to any of the senses.

"Fifteenth. If the jury believe from the testimony that the plaintiff has knowingly and wilfully lessened in any degree or extent any previous injury he may have received, when upon the stand as a witness, or has knowingly and wilfully augmented in degree or extent the injury complained of in this case, then I instruct you that you are at liberty to wholly disregard any and all of his testimony."

The instructions requested by the plaintiff in error, and refused, are as follows;

"(1) The court instructs the jury that the step along the side of a street car is for the purpose of assisting passengers to get into and alight from the cars, and is not the proper place for a passenger to occupy in riding from place to place on a car, and it is the duty of every passenger to procure and occupy a seat inside of the car, if same can be done; and if at the time plaintiff, Charles Higgs, got upon defendant's car on the afternoon of October 1, 1885, there were seats unoccupied on said car, and plaintiff voluntarily stood upon the step of the car, and failed to procure a seat, and was afterwards bruised and injured by reason of the exposed position he had taken, the defendant is not liable in this case, and the jury will so find.

"(2) The court instructs the jury that it is the duty of the defendant to exercise all reasonable precaution and care for the safety of its passengers, but it is also the duty of each and every person, while riding on a street car, to use ordinary care for his own safety, and reasonable precaution to guard against accidents. And if the jury believe that at the time the plaintiff got aboard of defendant's car, on the afternoon of October 1, 1885, he was lame and weak, so that he was not able by reason of said bodily infirmities to use ordinary strength and care to protect himself from accident, and the position on the step of the car was thereby more hazardous to plaintiff, then the act of the plaintiff in taking the exposed position on the step of the car was negligence, and he cannot recover in this case.

"(3) The court instructs the jury that the state of facts read to you by the defendant, of Dr. P. I. Mulvane, is to be taken and considered by you as the deposition of Dr. P. I. Mulvane.

"(4) The court instructs the jury that regardless whether the defendant permitted a passenger to occupy the roof, or outside platform, any passenger doing so, knowingly and intentionally, and of his own motion, is guilty of negligence, and cannot recover for any injuries resulting from occupying such exposed and dangerous place.

"(5) I instruct you that the inside of the car, provided with seats, is the proper place for a passenger to take upon going onto a street car for passage, and that it is negligence to stand on an outside platform, at the side, and hang onto the post of the car for security of standing; and this, whether there are seats or not. If there are no seats, and the passenger knows this, he should not attempt to ride.

"(6) If the jury believes from the evidence that the plaintiff, at the time of receiving the injury complained of, was crippled, and had to use a crutch and cane for the purpose of locomotion, and that he of his own motion went to the car, and could have secured a seat and did not, and stood on the outside of the car when he had been requested by the conductor to take a seat, but refused or failed to do so, then I instruct you that his conduct was negligent under these circumstances, and he cannot recover in this case."

"(8) The court instructs the jury that they can take into consideration the conduct of the plaintiff, the previous accidents which had happened to him, the effect of it upon him at the time of and after the injury complained of in his petition, the fact that he failed to occupy a seat on the car, the fact as to whether he was requested by the conductor to take a seat or not, the fact as to whether or not he was crippled at the time, and in this condition stood upon a step outside the car,—all these facts and circumstances are to be considered, with other facts and circumstances in this case, in determining the weight and credibility of the plaintiff's testimony, as to whether he was negligent under the circumstances, and the extent and character of his injuries.

"(9) The court instructs the jury that it appears from the testimony that whatever the injury or its extent now is to the plaintiff, that it is not visible to examination or inspection, and to which or about which only the plaintiff can testify; and it is proper to say that under such circumstances it is the duty and province of the jury to more closely scrutinize the testimony, in determining whether the plaintiff is now injured or not, than if his injuries appeared to or could be made apparent to any of the senses.

"(10) If the jury believe from the testimony that the plaintiff has knowingly lessened in degree or extent any previous injury he may have received, when upon the stand as a

witness, or has knowingly augmented in degree or extent the injury complained of in this case, then I instruct you that you are at liberty to wholly disregard any or all of his testimony."

Jones & Mason and J. G. Waters for plaintiff in error.

W. R. Hazen and Hazen & Isenhardt for defendant in error.

SIMPSON, C.—The defendant in error was a passenger on one of the open cars of the street-railway company on the evening of October 1, 1885, at a time when there was a vast concourse of people in the city of Topeka, drawn together by a sham battle on the fair-grounds, during a soldiers' reunion. The car upon which the defendant in error was riding was going north from the fair-grounds along a street known as "Topeka Avenue." On this street, and between Huntoon and Thirteenth streets, is located, alongside of the main track of the street railway, and to the east of it, a switch track, 217 feet long from point to point, used to allow cars to pass. The car upon which defendant in error was riding was what is called an open car. On each side of the frame of the car, extending its whole length, there was a foot-board from 8 to 10 inches wide, to enable passengers to step into and out of the car; and, on occasions when there were a large and unusual number of passengers to be carried, these foot-boards were utilized by the company, and passengers were allowed to stand upon them, and to be carried on them, from station to station. Higgs was standing on the west foot-board, north of the centre of the car, and near to its front end, when the car turned onto the switch, went so far north on it and approached so near to its intersection with the main track that a closed car coming south on the main track ran so near the open one on which he was riding that he was squeezed against one of the posts that support the roof of the open car, and was bruised and injured in the shoulders and back. The jury found, in answer to special questions propounded to them, that the open car upon which he was riding, at the time the injury occurred, was in motion, and there is no question under the evidence but that the closed car, going south on the same track, was also slowly moving. It does seem that, considering the vast crowd of people that were being transported by the street-railway company,—the large number that was on this particular car, every seat being occupied, the front and rear platforms being crowded, and many persons standing on both foot-boards,—it was gross negligence upon the part of the employees of the railway company to approach so near the intersection of the switch with the main track.

This act of the employees of the company was the direct

and immediate cause of the injury inflicted on the defendant in error. It is among the special findings of the jury, in substance, that the car was so crowded at the time Higgs got upon it that there was no seat that could be occupied by him; that his only chance was to ride upon the foot-board. It is in evidence that, when large numbers of people were to be carried, the railway company permitted passengers to ride on the foot-boards, and collected fare from them; that on this occasion people vastly in excess of the number of seats contained in such cars were carried; so that there was no contributory negligence on the part of the defendant in error, in getting on the foot-board of the car to ride to town, and standing there, being unable to secure a seat on account of the crowded condition of the car, there not being a vacant seat that he could have taken. It is sought to establish contributory negligence on the part of the defendant in error by proof that before this time he was crippled, and on this day was using a crutch and cane; that the superintendent of the

Contributory
negligence—
Plaintiff's
crippled con-
dition.

street-railway company, to whom he was personally known, had noticed that he was using the crutch and cane, and had warned him not to attempt to get on the cars "while there was such a rush," and promised to get him a seat in the cars; that Higgs waited for more than one hour after that promise, during which time the superintendent states that probably twenty-five cars had started, but he had done nothing to secure Higgs a seat. At the expiration of this time Higgs went north the length of a block, and he and a lady relative, whom he was escorting on that day, got on the car upon which he was injured, and rode down to the starting place, hoping by that means to get a seat, but there was only one vacant seat, and that was given to the lady. As the car approached the usual stopping place, the crowd there awaiting an opportunity to get down town surged on the car as those who had ridden from town were getting off, and occupied every seat as fast as they were vacated. The special finding is that there was not a seat that he could have taken. Then, according to the usages and practices of the company on such occasions, he had the right to get upon the foot-board of the car, and ride thereon, and in this case it was not an act of negligence on his part. He was not injured in the act of getting on the car, as the superintendent seemed to be in fear of,—this act he had performed safely,—but he was injured by the negligence of the employees of the company, who permitted the open car to be placed so near the point of intersection of the switch with the main track that the cars could not pass each other with safety to the passengers. We cannot

see that his use of a cane, and his temporary use of the crutch on that day, relieves the company from the liability caused by this act of gross negligence on their part. It appears from the evidence, that the driver of the car was temporarily employed for the time of the reunion, and was probably inexperienced by want of former employment in this line of work, although the company kept him in their employment after the accident, and up to the time of the trial of the cause.

It is said that he could have seen the car coming on the main track, and avoided the injury by the exercise of ordinary caution. This is a dangerous assumption for the plaintiff in error. It is virtually saying that the use of his eyes ought to have made it apparent that the company was about to commit an act of gross negligence; but as he says he did not see the car until a moment before the injury occurred, we would much rather assume, for the sake of the employees on both cars, that the risk was not so imminent as to be seen and apprehended by the passengers. As a matter of fact, he did not see the danger until it was too late to avoid it. He was not guilty of contributory negligence in respect to any of the acts and matters alleged.

It must be held that when a street-railway company undertakes to carry large numbers of people, vastly in excess of the seating capacity of their cars, and permit passengers to ride on the platforms and foot-boards, without objection, and collect fare from them, and stop their cars when in such a crowded condition that no seats are attainable, and permit persons to get upon them to be carried from place to place, and when the cars are in such a crowded condition, with passengers riding on the foot-boards, place them so near the intersection of a switch with the main track that they cannot pass without injury to passengers, the company is guilty of gross negligence.

Company guilty of gross negligence.

1. There is very vigorous criticism of some instructions given, and of the refusal to give others, as requested by the plaintiff in error, but the important question to be solved is presented by the third instruction given, to wit: "Carriers of passengers are bound to exercise all possible skill, foresight, and care in the running of their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run." It is said that this places the degree of care required of a street-railway company too high, and hence it was error. Admitting that this instruction does hold the street-railway company to a too strict rule of diligence, and yet, as we view the evidence on the whole record, we would still hesitate to

Degree of care required—Instruction.

reverse the case. We doubt if it would have been error in the trial court to have instructed the jury, as a matter of law, that the plaintiff was guilty of gross negligence in running their cars, for several reasons:

2. The question of negligence in this case is to be determined very largely by the character of the act, and not by

**Negligent
character of
act com-
plained of.** the character for care and caution which the street-railway company may sustain, or by the care and caution they were trying to exercise generally on this particular occasion. The negligence com-

plained of here was the commission of such an act, to wit, the placing of the car on the switch so near the point of intersection with the main track that the most ordinary mind could see that injury would follow to those standing on the foot-boards. It seems that the evidence offered by the street-railway company aggravates, rather than excuses, the negligence. It is, in substance, that there was another car going north, and following the one the injury occurred on, and that it was necessary to drive the first so far north on the switch, so as to allow the one that was following room on the switch to pass the south-bound car on the main track. This is a demonstration that the switch was not properly constructed, that it was too short, or that it was intended for only one car, and ought not to have been used by both cars going north. In either event, it shows negligence on the part of the company. The superintendent of the company testifies that the length of the switch was 217 feet, from point to point; that from the north point of the switch, running south, the radius of increase of the width between the switch and main track, for the first 40 feet, is 1 inch to the foot; for the next 20 or 30 feet there is not so much increase, as it then approached a straight line, parallel with the main track; that the cars could pass each other, and not touch, when the front end of the car on the switch was 26 feet from the point where the switch left the main track. It is from 70 to 72 feet from the points of intersection where the switch commences to curve in for the purpose of running on the main track. This leaves a length of switch, with an equal distance from the main track, of 48 feet, the distance from the main track being not quite 2 feet. A person riding on the foot-board would be perfectly safe at any point on the switch until after it curves towards the main track. The skill, care, and precaution of drivers, conductors, and the superintendent generally amounts to nothing, in view of the plain fact that this car was driven too far north on the switch. It was this act, in this particular case, that was the direct and immediate cause of the injury. The defendant in error had a

right to presume due care on the part of the railway company. He was riding on the car in a position allowed to be occupied by other passengers on like occasions. He had no control over the employees of the company, and no knowledge of the switch, or that the company was using it beyond its safe and reasonable capacity, but had the undoubted right to rely on the exercise of ordinary prudence by the street-railway company, both as to the use of the switch, and the management of their cars in the act of passing each other, when one or both were crowded with passengers. The fact that the cars, both in motion, came so near each other in the act of passing that the injured man was pressed by them,—squeezed in between them,—is not in dispute. Hence we saw that if the court below had charged the jury, as a matter of law, that this was gross negligence on the part of the street-railway company, we would hesitate to say it was error; but, as that was not done, we will consider the instruction, and determine whether or not it stated the rule of diligence.

Cars drawn by horses upon rails are, in the main, governed by the same rules as other vehicles. Shear. & R. Neg. (3d Ed.) 312. In an action to recover damages for personal damages sustained as a passenger in a stage-coach, the court has approved an instruction that stated "that a stage-coach proprietor, who carries passengers for hire, is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight." *Sawyer v. Sauer*, 10 Kan. 466. So that the only objection to the instruction given in this case results from the use of the word "possible," and it means "liable to happen or come to pass;" "capable of existing or of being conceived or thought of;" "capable of being done;" "not contrary to the nature of things." Webst. Dict. "All possible skill and care" imply that every reasonable precaution in the management and operation of street cars be used to prevent injuries to passengers; they mean good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. "All possible foresight" means more than this; it means anticipation, if not knowledge, that the operation of street cars will result in danger to passengers, and that there must be some action with reference to the future; a provident care to guard against such occurrences; a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so. Is it possible that the thought never occurred to any one of the persons operating this street-railway that a car on the main track and

Street rail-ways—"All possible care"—"All possible foresight."

one on the switch would run so close together that they would collide, or that some one might be injured by their proximity? The instruction, as applied to the particular facts of this case, is not objectionable. Its phraseology may not be felicitous, but it does not practically require any greater or higher degree of care than if the expression used had been "the highest" or "the utmost," and these are frequently found in the reported cases.

The case of *Tuller v. Talbot*, 23 Ill. 357, cited by plaintiff in error, is a case of injury by a stage-coach, and the court say: "Common carriers of persons are required to do all that human care, vigilance, and foresight reasonably can under the circumstances, in view of the character and mode of conveyance adopted to prevent accident to passengers." All that human care can do is the "highest," "utmost," "possible" effort. The case of *Meier v. Railroad Co.*, 64 Pa. St. 226, is one in which a passenger in a sleeping-car was injured by the axle of the forward truck of the car breaking by reason of a latent defect in its construction, not discernible by those who were skilled in such matters, and has no application here, the facts being entirely different; and yet the court say in that case: "The carrier may relieve himself by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could prevent."

The supreme court of the United States, in their opinion in the case of *Railroad Co. v. Derby*, 14 How. 468, say: "When carriers undertake to convey persons by the powerful, but dangerous, agency of steam, public policy and public safety require that they be held to the greatest possible care and diligence." In that case it was the greatest possible care and diligence in the management of steam cars; in this case it is all possible skill, foresight, and care in the use of horse cars. Both of these expressions are used with reference to the character and modes of conveyance adopted in either case. They are similar in meaning and in legal effect, and yet are not to be understood to require that the same preventive measures or wise precautions that are taken by those directing the operation of steam cars must be taken by those in charge of horse cars, but they do mean that the best effort of the minds directing the operation and supervising the management of steam cars and of horse cars, shall be diligently applied in devising ways and means to prevent injuries to passengers being carried thereon. Steam cars may require greater care in their management, and greater caution in their operation, but the passengers are entitled to the highest possible degree of each. So those riding on street cars have the legal right to insist that they shall be managed and ope-

rated with all possible skill, care, and foresight which in their nature they are capable of.

The theory of counsel for the plaintiff in error seems to be that the rule of highest skill can only be applied to cars propelled by steam, because it is the most dangerous of all modes of conveyance. We think that the rule applies to street cars, and other vehicles drawn by horses, to its full extent; the difference being in the means and instrumentalities used to prevent accident, by reason of the mode, rather than to the degree, in which the preventive means are to be employed. To each must be applied the greatest degree of skill, care, and foresight to which they are susceptible, to avoid liability for injuries occasioned in their operation. We think there is no error in the instructions given, and no error in refusing the instructions asked for.

3. Objection is made to instructions 4 and 6, wherein the court instructs the jury that the mere fact that the plaintiff, Higgs, was riding on the step of the car would not defeat his right to recover, if it was customary to ride there and the car was so crowded he could not procure a seat, and if he rode there without objection from the conductor or other employee of the company; and it is said that they were clearly wrong, because there was no evidence of any permission to ride on the step, and because the evidence was undisputed that the plaintiff, Higgs, had been distinctly warned against riding there; and the case of *Huelsenkamp v. Railway Co.*, 34 Mo. 45, is cited, and claimed to be decisive of this question. What are the facts as developed by the witnesses produced by the plaintiff in error? The superintendant says, "I said to Higgs, 'Don't try to get on the cars while there is such a rush. As soon as I can, I will get you a seat,'" but he never did anything more than to talk to him; made no effort to furnish a seat. It is not in terms a warning not to ride on the foot-board; it is an expression of fear that, as he was crippled, he might get hurt in the rush, coupled with a promise to get him a seat. He did not get hurt in the "rush," and he did not get a seat. The superintendent also stated that at the reunion it was customary for persons to ride on the foot-boards, on the platform of the cars, and even on the top of the cars, and that the conductors collected fare from them wherever they rode, but they were requested not to so ride by him. On all cars that started after he had promised Higgs to get him a seat, persons were riding on the foot-boards; that upon all the cars coming to and going from the city the company allowed men, women, and children to continuously ride upon the front platform, the rear platform, and also upon the foot-

Instruction as to negligence in riding on step.

boards of the cars, and collected fare from them; they collected fare from men riding on the top of the cars the same as if they had ridden on the inside of the cars; that the seating capacity of an open car is 25 persons, and they carried from that number to 80 persons; that they stopped to receive passengers, and allowed them to get on, long after the seats were all occupied. Fare was collected if they got on the car, without reference to whether they had a seat or not. The conductor of the car said that it was a fact that passengers continuously rode on the foot-boards, and sometimes on the top of the cars, and he collected fare from them. These citations from the evidence in the record abundantly establish the proposition that on this occasion the defendant in error had permission to ride on the foot-boards, and had not been distinctly warned against riding there. These facts justify the instructions complained of. The case cited was reversed because no such permission was proved or shown on the trial below. Here it was shown conclusively, by the witnesses of the plaintiff in error, that the usage and practice, whenever there was a large crowd to be accommodated, was for men, women, and children to continuously ride on the foot-boards and that fare was always collected from them.

4. The second instruction asked by the street railway company was properly refused, because it did not state the rule of diligence and care required by such company in the operation of its road and the management of its cars.

5. The answer to special question No. 4, submitted to the jury, must be construed in the light of the evidence respecting the subject-matter of the interrogatory. In the view of

counsel for plaintiff in error, a person in a crippled condition has no right to ride on a street car under any circumstances, except when a seat is furnished by some employee of the company. It is unquestioned that the company can make all such rules

respecting the manner in getting off or on the cars; the place where passengers are to ride; and every other reasonable regulation that conduces to the safety and accommodation of the persons to be carried over their line, and have the undoubted right to insist on their due observance; but, having done so, they must not be the first to violate them, or depart from their requirements, so that if they are permitting men, women, and children, on public occasions, when there is a large number of persons to be carried, to ride on the foot-boards of their cars, they cannot relieve themselves of liability for such an injury to a person on the foot-board by a warning and a promise of a seat. The defendant in error had the same right to ride on a foot-board of the car as any other pas-

Same—Plaintiff's crippled condition.

senger whom they carried on that day. If, on account of his crippled condition, he had been injured by people rushing to get on or off the cars of the company, of course no liability would attach to the company on account of such an injury. His crippled condition did not change his rights or vary the duties and obligations of the company as a carrier of passengers, in any respect, except that he was entitled to a longer time in which to get on or off the cars than a passenger who was not crippled or infirm. He was not injured by reason of his crippled condition, nor is there any evidence that shows that such condition, either directly or indirectly, contributed in any manner to the injury.

It is also insisted, in this connection, that the position, taken knowingly and intentionally by the defendant in error, is negligence *per se*, and for that reason the company is not liable. While we have substantially disposed of this objection, in what we have said on another branch of the case, it is well to reinforce that view by citations from a few well-considered cases :

In *Railway Co. v. Walling*, 97 Pa. St. 55; s. c., 2 Am. & Eng. R. R. Cas. 20, "the passenger voluntarily got upon a car so crowded that he was obliged to take a position on the step of the front platform of the car, occupied at the time by two other men, between whom he squeezed into a position, where, for the purpose of retaining his place, he was obliged to hold fast by one hand to the dasher, and with the other to the iron bar under the window of the car. The car stopped when he hailed it, and received him as a passenger. The driver testifies that he knew the car was so full a man could not go through it to the rear platform. Crowded as it was, the conductor said there was room for more, both inside and on the rear platform; but Walling first tried to get on the rear platform, and, failing, went to the front. Conductor, driver, and passengers acted as if there was room so long as a man could find rest for his feet and a place to hold on with his hands. The companies do not consider such practices dangerous, for they knowingly suffer it and are parties to it. Their cars stop for passengers when none but experienced conductors see a footing inside or out. Street-railway companies have all along considered their platforms a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous that one who pays for standing there can recover nothing for an injury arising from the company's default? So little danger exists in riding on platforms, accidents to passengers while thus riding are so rare, that this

Same—Au-
thorities.

is the first time the question raised has been presented in Pennsylvania."

In *Meesel v. Railroad Co.*, 8 Allen 234, the court say: "The seats inside are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and continue to stop and receive them, even after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the travelling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of the danger. There is therefore no basis upon which the court can decide, upon the evidence reported, that the plaintiff did not use ordinary care." The facts in this case were very similar to the one cited from Pennsylvania. Standing on the front platform of a horse-car, when there is room inside, is not conclusive evidence that the person injured by the driver's default was not exercising due care. *Maguire v. Railroad Co.*, 115 Mass. 239. A street-railway company has the right to carry passengers on the platforms, and if a passenger be injured while standing there, without objection by the company's agent, whether the injury was with his contributory negligence is for the jury to decide under all the facts and circumstances detailed in the evidence. *Burns v. Railway Co.*, 50 Mo. 139. It has also been decided in other states that, if a passenger be injured while standing on the platform of a street or horse car, the question of his contributory negligence is one of fact for the jury.

In *Nolan v. Railroad Co.*, a very recent case decided by the New York court of appeals (87 N. Y. 63; s. c., 3 Am. & Eng. R. R. Cas. 463), "the plaintiff, a passenger of a street car, rode on the front platform, without warning or notice to the contrary, for the purpose of smoking. There was plenty of room inside, but the conductor took his fare without comment." Being thrown off and injured by a violent and negligent jolt, it was held that he was not debarred from recovery, by occupying the platform. It seems from these cases that there could be no pretence for saying, under the particular facts of this case, that the defendant was negligent *per se*.

There is nothing in other exceptions that would justify reversal. It is recommended that the judgment be affirmed.

BY THE COURT.—It is so ordered; all the justices concurring.

Riding on Steps and Platforms of Street Cars.—See *North Hudson Co. R. Co. v. May*, 27 Am.

& Eng. R. R. Cas. 151; Fleck *v.* Union R. Co., 16 Am. & Eng. R. R. Cas. 372; Germantown Pass. R. Co. *v.* Walling, 2 Ib. 20; Wells *v.* Lynn & B. R. Co., 2 Ib. 27; Thirteenth, etc., St. Pass. R. Co. *v.* Boudrok, 2 Ib. 30; Nolan *v.* Brooklyn, etc., R. Co., 3 Ib. 463; Downie *v.* Hendry, 8 Ib. 386.

Street Railway Companies Required to Exercise Utmost Care and Foresight. See Dougherty *v.* Missouri R. Co., *ante*, p. 488.

QUACKENBUSH

v.

CHICAGO AND NORTHWESTERN R. CO.

(*Iowa Supreme Court, December 15, 1887.*)

Passenger—Negligence—Switching—Unnecessary Shock.—Evidence that, in switching, a number of heavily loaded cars were backed with unnecessary force against standing cars, causing the latter to come suddenly and with such force against the car in which plaintiff was a passenger, whereby he was thrown from his seat and injured, is sufficient to support a verdict finding the company guilty of negligence.

Same—Travelling in Caboose—Chairs.—The fact that plaintiff, a passenger travelling in the caboose of a train, was sitting in a chair when abundant sitting accommodation had been provided by stationary seats round the side of the car, and that if he had used the stationary seats he would not have been thrown down and injured, does not show to contributory negligence on plaintiff's part, plaintiff being justified in inferring that the chair was placed there for use as a seat.

Same—Disease Induced by Injury—Evidence—Instruction.—In an action in which the injuries complained of were caused by plaintiff being thrown from his seat against the stove in the car, hurting his nose and as plaintiff claimed, causing catarrh, an instruction that there is no sufficient evidence to warrant the jury in finding that plaintiff's catarrh was caused by the injury complained of is properly refused, when plaintiff has testified that the injury was followed by catarrh and that he had no catarrh before, and the medical testimony tends to show that the injury might produce catarrh.

Same—Sufficiency of Evidence—Instruction—Verdict.—Upon such evidence, a verdict for the plaintiff will not be reversed as contrary to an instruction that an expert's opinion that a result may possibly follow from a certain cause,—i.e., that such result is simply possible, and not the general or usual consequence of like conditions,—does not, in the absence of proved facts or circumstances tending to that end, contribute sufficient evidence that such exceptional or possible result did in fact follow in the given case, especially when it does not appear from the verdict that the jury found that the catarrh was caused by the injury, or allow any damages on account thereof.

Same—Evidence—Medical Book—Competency.—If an extract from a medical book has some bearing upon the extent of the passenger's inju-

ries and their cause, it ought not to be excluded on the ground that it is too indefinite, the indefiniteness affects its value of weight as evidence rather than to its admissibility.

APPEAL from District Court, Hamilton County.

Action by John E. Quackenbush against the Chicago & Northwestern R. Co. to recover damages for personal injuries. Defendant appeals from a judgment for the plaintiff. The opinion sufficiently states the case.

Hubbard, Clark & Dawley for appellant.

W. J. Covil and W. Martin for appellee.

ADAMS, C.J.—The plaintiff was riding in a caboose. A stationary seat had been provided around the side of the car for the accommodation of passengers, but the
 Facts. plaintiff, at the time of the accident, was sitting in a chair. The caboose was a part of a train standing upon the track. Other cars, somewhat heavily loaded, were brought upon the track to be coupled to the part of the train which included the caboose. The moving cars were thrown back with such force against the standing cars that the plaintiff, while sitting in a chair in the caboose, was thrown against the stove, and received an injury upon the nose, which is the injury for which the action is brought.

1. The defendant insists that the verdict is without support, in that there was no evidence tending to show negligence on the defendant's part. The plaintiff's allegation of negligence, as contained in his petition, is
 Negligence in moving cars. in these words: "Said negligence was caused by the defendant's servants in switching or otherwise moving cars. While the car in which the plaintiff was a passenger was standing upon the track, with other cars forming part of the train, a number of heavily loaded cars were backed at great speed against said standing cars, causing said cars to come suddenly and with great force against the car in which the plaintiff was a passenger, whereby he was thrown from his seat in the car violently forward upon the stove in the car." The defendant does not deny that the plaintiff was thrown from his seat upon the stove by reason of the moving cars being thrown against the standing cars; but it insists that there was nothing in this tending to show negligence. The defendant's contract was to carry the plaintiff safely, if it could do so in the exercise of the strictest care. Now, the evidence shows that the moving cars could have easily been moved back in such a way as not to injure the persons in the caboose. We think that the finding that the defendant was guilty of negligence is abundantly supported.

2. The next position taken by the defendant is that the undisputed evidence shows that the plaintiff, by his own negligence, contributed to the accident. The fact relied upon is that the plaintiff was sitting in a chair. It is said that a chair was a dangerous thing to sit in in such a place, and that the plaintiff should have avoided it, especially as abundant sitting accommodations had been provided by stationary seats around the side of the car. It is not to be denied, we think, that, in case of any sudden and violent propulsion of the caboose, a chair, not fastened to the floor or otherwise secured, was less safe than the seats around the sides; but it is not easy to discover what the chair was in the car for if not as a seat. We think that the plaintiff was justified in inferring that it was placed there as a seat, and, if so, that the defendant would so manage its train in switching as not to throw a passenger or any other person from the chair upon the stove. We cannot say that the plaintiff was guilty of contributory negligence.

Sitting in chair not contributory negligence.

3. Evidence was introduced by the plaintiff for the purpose of showing that the injury which he received upon his nose had produced catarrh. The defendant asked the court to instruct the jury that there was no sufficient evidence to warrant them in finding that the plaintiff's catarrh was caused by the injury complained of. The court refused to so instruct, and the defendant assigns the refusal as error. The plaintiff testified that the injury was followed by catarrh, and that he had never had catarrh before. One Dr. Eberle was examined as a witness, and was asked whether an injury upon the nose might produce catarrh, and, if so, how. To this he answered: "It might by progression. Any inflammatory action of the membrane may produce catarrh. A lacerated wound of the cartilaginous portion of the nose adjoining the nasal bones would produce inflammatory action." Another physician who had made an examination of the plaintiff's nose testified that he found it in a highly inflamed condition. Another physician testified that he found inflammation producing sanguinous discharge. All testified, however, that they had never known a case where catarrh had been produced by an injury to the surface of the nose, and one testified that the books gave no instance where catarrh was known to so originate, but he testified that the books say that there may be such a result. If the plaintiff received an injury which, according to the physicians and the books, might produce catarrh, and the plaintiff never had catarrh before, but had it soon afterwards, we think that there was some ground for an

Catarrh induced by injury—Evidence.

inference that the plaintiff's catarrh was caused by the injury, and we do not think that the court would have been justified in giving the instruction asked.

4. The court instructed the jury that an expert opinion that a certain result may possibly follow from a certain cause, that is, that such result is merely possible, and not the ordinary or usual consequence of like conditions, does not, in the absence of proved fact or circumstances tending to that end, contribute sufficient evidence that such exceptional or possible result did in fact follow in the given case. It is insisted that the verdict is contrary to this instruction. But, in our opinion, we cannot so hold. In addition to the evidence of the experts and the books, there was the proven fact that the plaintiff never had catarrh before, and did have it soon afterwards. Besides it does not appear that the jury found that the catarrh was caused by the injury, nor allowed any damages on account of the plaintiff's catarrh. It should seem, indeed, from the amount of the verdict, that they did not. The amount was only \$395, and there was evidence that the plaintiff sustained considerable injury independent of the matter of the catarrh.

Same—Instructions as to cause of catarrh.

5. The defendant assigns as error the overruling of an objection interposed to a certain question asked an expert witness by the plaintiff. This question is in these words: "State whether a blow upon the nose which was sufficient to break the bones would probably excite inflammatory action of any membrane of the nose?" The witness answered, "Most certainly." The objection urged in argument is that there was no evidence that any bones in the plaintiff's nose were broken. That objection, however, does not appear to have been specifically made upon the trial. The objection there made was that the question was irrelevant, immaterial, and leading, and that the witness had already testified upon the subject. There was nothing in this which would necessarily suggest the objection now urged, and we cannot say that the court erred in not sustaining the objection.

Expert testimony.

6. The defendant assigns as error the admission in evidence of an extract from a medical work on Diseases of the Throat and Nose. The extract is in these words: "Purulent inflammation of the nasal mucus membrane in exceedingly rare cases may be simply an aggravation of the ordinary catarrh. It may likewise result from injuries." The objection urged is that the statement is too indefinite; but we cannot say that it has no bearing upon the question at issue. If it has some bearing, the indefiniteness

Extracts from medical books.

of the statement, it appears to us, goes to its value or weight as evidence, rather than its admissibility.

We see no error, and the judgment must be affirmed.

Injury to Passenger Caused by Sudden Jolt of Car in which He is Riding.
—See *Lakin v. Oregon Pac. R. Co.*, *ante*, p. 500; *Bartholomew v. New York Cent., etc., R. Co.*, 27 Am. & Eng. R. R. Cas. 154; *Harris v. Hannibal & St. Jo. R. Co.*, 27 Ib. 216; *Wallace v. Western N. Car. R. Co.*, *post*, 553.

SOUTH SIDE PASSENGER R. CO.

v.

TRICH AND WIFE.

(*Pennsylvania Supreme Court.*)

Passenger—Personal Injuries—Negligence—Proximate Cause.—If the undisputed evidence shows that a passenger, who attempted to take a car, safely reached the step, remained there for a short distance, and was jerked from it upon the street owing to the driver whipping his horses to avoid collision with a runaway horse and buggy, safely alighted upon her feet, and immediately thereafter was struck by the runaway, being struck by the runaway, and not being jerked from the step of the car, was the proximate cause of the injury, and such passenger has no cause of action against the car company.

ERROR to Court of Common Pleas No. 2, Allegheny County.

Actions by Mr. and Mrs. Trich against the South Side Passenger R. Co. to recover damages for personal injuries sustained by Mrs. Trich. Mrs. Trich and her father signalled a car belonging to defendant, which was coming up Third avenue, Pittsburg, the car, in common with the other cars used by the defendant, was what is known as a "bob-tailed car," with a driver, but without any conductor. Mrs. Trich got upon the car platform and took hold of the rail, when the car started. She remained there until the car reached the middle of Smithfield street, a distance of about 60 or 70 feet from the place where Mrs. Trich entered it. The driver, seeing a runaway horse and buggy approaching down Smithfield street, whipped up his horses to avoid a collision. As a consequence, the horses caused the car to jolt, and Mrs. Trich was jerked off the platform, and alighted on her feet in the street, uninjured. Immediately afterward she was struck by the run-

away horse, knocked down and injured. The defendant's attorney requested the court to direct the jury that, even if there was negligence on the part of the driver in starting too soon, such negligence was not the proximate cause of the injuries to Mrs. Trich; but the court refused to do so, the jury entered a verdict in both actions against the defendant, which plaintiff brings error to review.

John Dalzell and Geo. B. Gordon for plaintiff in error.

A. & A. M. Blakeley for defendants in error.

GREEN, J.—There is no manner of question as to what was the actual and immediate cause of the injury inflicted upon Mrs. Trich. It was an entirely undisputed fact that she was struck and injured by a runaway horse and buggy.

Evidence as to
accident.

All the witnesses who saw the occurrence so testified. Thus, Mr. McCully, the father of Mrs. Trich, who was present with her at the time, and was examined on her behalf, after describing her attempt to get on the car, and saying that she was bounced off, adds: "A moment or two afterwards, here comes a runaway horse and buggy down the street, and the shaft, I suppose it was, caught her under the arm, and dragged her to the street crossing, and she fell away." The only other witness examined for the plaintiff as to the facts of the occurrence, M. M. Harrington, testified: "There is a banking building there on the corner, and I saw the lady fall,—fall off; and when she fell, to the best of my knowledge, she kind of threw herself back this way, and there was a phaeton or buggy of some kind running,—a horse running down the street with a buggy,—and it struck her, and they picked her up, and carried her into Mr. Johnson's drug store." There was no contradiction of this testimony. But one other witness, Mrs. Vrailling, examined by the defendant, testified to the fact of the injury, and she also said it was done by the buggy striking the woman. The learned court below, in the charge, said: "The evidence seems to me to preponderate very largely in favor of the fact that the immediate force which caused the injury to this woman was the runaway horse." This was an understatement of the testimony which might have led the jury to suppose that there was an open question, with a preponderance of evidence only as to whether it was the runaway horse and buggy which inflicted the injury. The defendant had presented a point stating that it was the undisputed evidence that Mrs. Trich was injured by being struck by a runaway horse, so that the question was directly before the court. In view of that circumstance, we think the court should have specifically so charged, and not left it as an open question for

the jury to determine, with a mere expression of opinion that the evidence preponderated in that direction.

Assuming, then, as we do, that it was the undisputed evidence that the injury was inflicted by the runaway horse and buggy, the only remaining question is whether it was the duty of the court to declare whether this was the proximate cause of the injury. The point presented by the defendant asked for such an instruction, but the court refused it, saying it was a question for the jury under the evidence. In this we think there was error. In the case of *West Mahanoy v. Watson*, 112 Pa. St. 574, we reversed the court below for making just such an answer to just such a point; and upon a review of the facts of the case we held that they did not constitute an instance of proximate cause as against the defendant, and therefore decided that the defendant's point should have been affirmed, which took the case from the jury. Mr. Justice Paxson, in delivering the opinion, said: "While it is undoubtedly true, as a general proposition, that the question of proximate cause is for the jury, yet it has been repeatedly held that where there are no disputed facts the court may determine it." It is sufficient to refer to *Hoag v. Railroad Co.*, 85 Pa. St. 292. In that case this court, following *Railroad Co. v. Kerr*, 62 Pa. St. 353, and *Railroad Co. v. Hope*, 80 Pa. St. 373, laid down the rule as to proximate cause as follows: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

Whether runaway was proximate cause of injury.

Applying this rule to the facts of the present case, can it be said that the injury of Mrs. Trich was the natural and probable consequence of the car-driver's negligence in urging his horses to a faster gait? We think not. There was not a particle of evidence to show that runaway horses and vehicles were frequently, or indeed ever, seen upon Smithfield street, where this accident occurred. There was no evidence upon that subject. It was certainly not a natural consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. The utmost that can be said would be that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural; for the latter are those things or events which are likely to happen, and which for that reason should be fore-

seen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. We are of opinion that, in the fact of the present case, that direct and immediately producing cause of Mrs. Trich's injury was her being struck by a runaway horse and buggy over which the defendant company had no sort of control, and for which it is not responsible; and therefore we conclude that the proximate cause of the injury, in the legal sense, was the collision of the horse and buggy with the person of Mrs. Trich, and not the negligence of the defendant.

The case of *West Mahanoy v. Watson* came again into this court, and is reported in 19 Wkly. Notes, Cas. 411. The present chief justice, in delivering the opinion of the court, said: "These facts narrow the case down to the single question, Was the upset at the ash-heap on the township road the immediate or direct cause of the loss of the horses? As we have seen, the facts themselves answer this interrogatory in the negative, and necessarily determine the case in favor of the plaintiff in error. In the case of *Hoag v. Railroad Co.*, 85 Pa. 293, Mr. Justice Trunkey, then president of the common pleas of Venango county, in his charge to the jury on the trial of the above-named cause, said: 'The immediate, and not the remote, cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, Did the cause alleged produce its effect without another cause intervening? or was it to operate through or by means of this intervening cause?' As the principle here stated was adopted by the affirmance of this court, following *Railroad Co. v. Kerr*, 62 Pa. St. 353, we may regard it as the settled law of this State."

In the facts of the present case we find a perfect illustration of this principle. Mrs. Trich herself testified that when she was "bounced" from the car she fell on her feet. Immediately after, she was struck by the runaway horse and buggy, and from them received her injury. The jolting from the car simply landed her on her feet, and inflicted no injury. But another agency intervened, which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question. Following the doctrine of the last case cited, we feel clearly obliged to hold that the plain-

tiff's injury was inflicted by the special intervening agency stated, and therefore the defendant is not liable. In all of the cases cited, as in several others not referred to, this court finally determined them upon its own view of the facts, without regard to the verdicts of the juries.

The defendant's point should have been affirmed. Judgment reversed.

Proximate Cause Defined.—See *Eames v. Texas & N. O. R. Co.*, 22 Am & Eng. R. R. Cas. 541; note to *Sheffer v. Washington City, etc., R. Co.* 8 Ib. 62.

WALLACE

v.

WESTERN NORTH CAROLINA R. Co.

(98 *North Carolina*, 94.)

Passenger—Freight Train—Contributory Negligence—Switching.—The dangers naturally incident to travel by rail being greater on freight than on passenger trains, and calling for a corresponding higher degree of care on the part of the passengers, a passenger in the caboose of a freight train which has stopped to do some switching, who knows or might know that cars will probably be backed against the part of the train to which the caboose is attached, and that there will consequently be some concussion, and who without thinking leaves his seat, standing up in the car, and is thrown down and injured, is guilty of contributory negligence in so standing up; if he would have escaped injury by keeping his seat.

APPEAL from Superior Court, McDowell County.

Action by W. J. Wallace against the Western North Carolina R. Co. to recover damages for personal injuries. Defendant appeals from a judgment for the plaintiff. The facts are stated in the opinion.

P. J. Sinclair and *W. H. Malone* for plaintiff.

D. Schenck and *C. M. Busbee* (*Erwin & Price*, of counsel) for defendant.

DAVIS J.—Civil action tried before McRae, J., at spring term, 1887, of McDowell superior court. In November, 1885, the plaintiff was a passenger on a freight train of the defendant company, going from the town of Facts. Old Fort to the town of Marion; and he alleges, substantially, that, for want of due care and attention, the locomotive to

which the train was attached was overloaded, causing it to "stall," and, by the careless, unskilful, and negligent management of the servants and agents of the defendant company, it was driven with such terrible force against the cars of the defendant as to cause the car in which the plaintiff was to be jerked and jarred with such force as to violently throw him down within said car, whereby he was greatly cut, bruised, and wounded, and had his leg badly fractured and broken, etc., and for his said injuries he claims \$8000 damages. The defendant company answers, denying the material allegations of the complaint, and for a further defence says plaintiff by his own negligent conduct contributed to his injury; that he was a passenger on a second-class car on a freight train, and knew it was not as safe and comfortable, or as easily managed and controlled, as a passenger train, and consented to the ordinary risk incident thereto, such as sudden jerks and starts or stops, etc.; that he knew the inconveniences of the seats and their condition, and assumed such risks as necessarily grow out of such appurtenances, and was bound to exercise more than ordinary care for his own safety, and that he failed to care for himself as he ought under the circumstances. There was evidence on behalf of the plaintiff, who was a passenger on a freight train of the defendant company from Old Fort to Marion on the seventh of November, 1885, tending to show that the train was behind time and overloaded; that at an up grade it stalled and stopped; that attached to the train was a caboose for passengers, with seats running along the sides,—one bench on each side; that a passenger in the caboose, named Clinard, with his arm in a sling, had a coat and bottle of liniment, which, upon a sudden jerk of the car, had fallen to the floor, and the plaintiff had picked it up, and was standing; that the train had jerked a number of times, and by a sudden and severe jerk—"crash," one of the witnesses termed it—the plaintiff was thrown to the floor, and had a bone of the thigh broken. It was also in evidence that the plaintiff knew that it was a freight train, had lived on the line of the road, had seen long freight trains, and "the engines starting them;" that there was plenty of room to sit down, and the plaintiff was near a seat, and that the other passengers were seated. One of them, W. H. Murphy, a witness for plaintiff, testified that "the train had stalled and jerked several times. He kept his seat. Was afraid of their running back to get a start, and knew they were pretty rough about starting." There was also evidence as to the nature and extent of plaintiff's injury, and of want of proper care and attention on the part of the conductor. There was evidence on behalf of the defendant tending to

show that the conductor and engineer was careful and skilful; that the engine was in perfect order; "that there were no defective cars, and that the hands were competent, prudent, and reliable. The track was in good order, but wet, and that the stall resulted from a wet rail. That the engine was not overloaded, and that the running back of a car, and slipping and jerking, in running of freight trains, is not unusual; it happens every day." That there is a difference in the coupling of freight trains from that of passenger trains, that causes the difference in the jerking. On the freight trains there is a "space or slack" of six or eight inches between each car. The advantage of this is "that, if it is all tight, you have the full weight of the train at the start; with the slack, you get the engine in motion before you get the full weight of the train." The evidence is set out in full, and sent up with the record, but, in the view we take of the case, it is not necessary to state it fully here.

The following issues were submitted, without objection: "(1) Was the plaintiff injured by the neglect of the defendant, as alleged in the complaint? (2) Did the plaintiff contribute to the injury by his own negligence? (3) What damage has plaintiff sustained?" The defendant asked the court to charge the jury: (1) That a passenger on a freight train accepts it, and takes it, and travels on it, acquiescing in the usual incidents and conduct of a freight train, if managed by prudent, competent men. (2) That in the movements of freight trains the jerking is inevitable, and is not ascribable to negligence or want of skill or improper management on the part of the agents of the company. (3) That it is not to be expected a company will provide its freight trains with all the conveniences and safeguards against danger that are required in the operation of passenger trains. (4) It is the duty of a passenger in a train to take ordinary care of himself. If danger is apparent or expected, he is to see and know it. (5) It is usual and proper for a passenger to remain in his seat; and especially so on freight trains, where he has reason to believe there is danger in any other position than being seated. (6) That there is no evidence that the engine or locomotive was overloaded. (7) That there is no evidence of careless management of the locomotive or cars on part of agents of defendant on this occasion. (8) That in review of, and in the light of, the evidence in this case, the injury was an accident, and not the result of negligence. The defendant assigns as errors (1) the refusal of his honor to charge as requested; and (2) that his honor erred in instructing the jury that there was no evidence of contributory negligence on the part of the

Issues submitted—Instructions—Errors assigned.

plaintiff, and that they must respond to the second issue "No."

Contributory negligence—Question for jury. The charge of his honor is set out in full, but, as we think there was error in instructing the jury that there was no evidence of contributory negligence, it is not necessary for us to consider how far the prayer for instructions, though not given in the form requested, was substantially met by the charge as given, or whether the charge did not cover the instructions asked for in the full extent to which the defendant was entitled; and we may say that we think the defendant was not entitled to the sixth, seventh, and eighth instructions at all. In *Smith v. Railroad Co.*, 64 N. C. 235, it is said: "When the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the court. When the facts are in dispute, the proper course for the judge is to explain what would be ordinary care under certain hypotheses as to facts, and have the jury to apply the law to the facts as they may find them." The same rule applies to negligence and to contributory negligence. If there is any evidence from which the jury may find facts constituting contributory negligence, it should go to the jury.

Evidence to show contributory negligence. Was there any evidence tending to show contributory negligence in this case? We think there was. A caboose attached to a freight train does not furnish all the appliances and conveniences for the safety and comfort of passengers that are provided for passenger trains; and while it is the duty of the company carrying passengers on such a train to exercise every reasonable care, and take every precaution against injury or danger to the life of such passengers which the appliances for that mode of transportation will admit of, it is also the duty of the passenger who travel on such a train, with full knowledge of the increased risk incidental thereto to be correspondingly careful in guarding against injury by reason of the risk incidental to such mode of travel. An act may be negligent or not according to the attendant circumstances. An act on a regular passenger train, with air brakes and other appliances to secure smooth and comfortable, as well as safer, travel may not be at all negligent in the passenger; while the same act on a "caboose," attached to a freight train, might be careless and negligent. It is a fact of common knowledge that even on a passenger train, with every appliance for comfort and safety that can be devised, there is more or less of jar and jerk incident to the starting and stopping of trains; and it is in evidence in this case that such jars and jerks are much greater on freight trains, and necessarily so, by reason of their character.

The passenger on such a train assumes the ordinary risk and discomfort incident thereto; and if the train is managed with such care and prudence, by skilful and competent employees, as to subject him only to the discomfort and risk thus incident, the company would not be liable for any accident resulting therefrom by reason of the failure of the passenger to observe usual and ordinary precaution. There is evidence tending to show that the plaintiff did not do this. It is in evidence that the jerks and jars incident to the freight train were known to him; that on this occasion the train was a long one, and the locomotive was moving it with difficulty, and there had been frequent jerks, more or less severe, and such as seem to have suggested to other passengers the propriety of retaining their seats; for one of the plaintiff's witnesses testified that he "kept his seat," knowing that "they were pretty rough about starting." It was in evidence that there were seats for all the passengers; and the fact that the others in the "caboose" kept their seats, and none of them were hurt, constitutes some evidence tending to show that it was careless and negligent in the plaintiff, under the circumstances, to be standing.

We think there was error in withholding from the jury the second issue, and the defendant is entitled to a new trial.

See *Quackenbush v. Chicago & N. W. R. Co.* and note, *ante*, p. 545.

SMITH

v.

RICHMOND AND DANVILLE R. CO.

(*North Carolina Supreme Court, March 26, 1888.*)

Passengers—Personal Injuries—Mixed Freight and Passenger Trains—Contributory Negligence.—A passenger travelling upon a train composed partly of freight and partly of passenger cars, who knows that the shocks in coupling such trains are greater and more frequent than in the case of trains composed wholly of passenger cars, is guilty of negligence contributing to injuries received through being thrown against a seat, if he sits on the arm of one of the seats with his elbow on the back of the seat and his hand holding on to the corner of one of the adjoining seats.

APPEAL from Superior Court, Durham County.

Action by L. T. Smith against the Richmond & Danville R. Co. to recover damages for personal injuries. Plaintiff appeals from a verdict and judgment for the defendant. The facts sufficiently appear in the opinion.

W. W. Fuller for appellant.

C. M. Busbee for appellee.

DAVIS, J.—Civil action to recover damages for personal injuries, tried before Merrimon, J., at January term, 1888, of Durham superior court. The plaintiff alleges that in June,

Case stated. 1887, he entered the regular passenger coach attached to the freight train of the defendant, at Durham, for the purpose of going to Hickory, and by the negligence of the defendant company he was seriously injured while in said coach at Durham. The defendant company denies negligence, and alleges that the injury received by the plaintiff, if any, was caused by his own negligence. The following issues were agreed upon: (1) Was plaintiff injured by defendant's negligence, as alleged in the complaint? (2) Did plaintiff's negligence contribute to his injury? (3) If so, was plaintiff's negligence the proximate cause of the injury. (4) What damage, if any, has plaintiff sustained?

The plaintiff entered the coach at Durham on the morning of the 15th of June, 1887, and his testimony is as follows: "I got to Hickory the afternoon of June 15th, leaving Durham on the freight. I went to the depot to take the

Facts. train about 3 o'clock in the morning of the 15th. A man in the railroad uniform, whom I think I saw afterwards taking up tickets, and whom I took to be the conductor, was asked by me if that was the place to get on, and he replied that the train would soon pull down in front of the ticket office. It was then just below, east of the ticket office. Pretty soon it did pull down, and he told me we could get on, and he assisted my wife to get on. When they pulled down, the engine and freight cars were cut loose, and were carried forward, and thrown back on a side track. That was the condition of the cars when we got on. This train was the regular early morning freight, with passenger cars attached. It had a sleeper and first and second class and baggage cars. It may have had the mail car, but I can't say. I bought tickets at the regular ticket office to Hickory for my wife and myself,—first class. I got in the first-class coach, and walked back near the middle, and took a seat in the regular way. About that time, Mr. Cheek, a friend of mine, came in. I got up, and passed the usual salutations. I then sat down on the arm of the seat, my feet on the floor of the aisle, my elbow on

the back of the seat, my hand clutching around the corner of the back of the seat next to the aisle, my wife sitting on a seat on opposite side of the aisle, one or two seats in my rear. I had been sitting there maybe a minute or more when a sudden shock came. The engine, with the freight cars, were thrown back against the coach, and I was thrown back against the coach, and I was thrown back against the corner of the seat in my rear. I was sitting on the arm of the seat, and the seat next in front was turned towards the rear of the coach, and the seat next in front was turned forward, bringing the backs near together. I had no warning of the approach of the train. My wife was thrown forward, striking her knees against the seat in front of her, bruised her knees, and caused her knees to swell. When I was thrown against the corner of the seat, the first sensation was a very painful one, with an indentation of the rib, and the second effect was to cause severe nausea. The general effect was to lay me up in bed with a severe wound for nearly three weeks, and since that for five weeks. I have not been able to do regular work; have not been able to get to my store to see patients; I have also had an attack of jaundice, that I attribute to this cause, which I have not been able to get clear of. I suffer acute pain all day of the injury. Got to Hickory about 2 P. M. Rev. Mr. Hord assisted me beyond Salisbury. He was on the train when I got on. I was not able to make an examination of myself for three or four days because of the pain. I found a considerable enlargement of some of the internal viscera,—any pressure would produce nausea. I believe the rib was fractured. Symptoms were acute pain, especially upon any movement. The pain still continues on pressure, but not so severe. I was in bed two weeks in June. My condition was very painful; no rest night or day; could not dress for the pain; not a moment since without pain; my health has been very poor ever since. The jaundice was produced by it. I have been using internal and external remedies. I have had medical attention. I have tried to the best of my abilities to cure myself. Cross-Examined: I went to Hickory in the spring of 1885. I was suffering from inflammatory rheumatism, and had been suffering for several years. I suffered in my legs, arms, and shoulders, and once in the intercostal muscles. Since 1885, I have not suffered anything like so much; have been much improved, and laid aside my crutches, and walked with a stick. I did not have as good use of myself, on account of the inflammatory rheumatism, as I would have had without it. My locomotive powers were affected by it. I was familiar with the methods of the night freight in Durham. I had travelled on it several times be

fore. The train generally stays at Durham some time, shifting and coupling. There is a great deal more jolting and bumping in the coupling of freight trains than in passenger trains, and I knew this at the time. I knew, when I got on the arm of the seat, that the freight cars had not been coupled to the passenger coaches, and that they were to be coupled. Before I met my friend I had been sitting in the seat. I have travelled frequently on freight trains, and on this train, but the shock was more severe than usual."

Dr. N. M. Johnson: "A practising physician eleven years. Have examined Dr. Smith since his injury,—about fourteen days after,—a knot on the rib. It looked like the rib was either partially or wholly fractured. He says he suffers. He looks like he suffers. If he has not recovered yet, in my opinion he never will get well. Cross-Examined: As a rule, one physician don't charge another."

John L. Markham: "Dr. Smith's general character is good. When he was here in June, his general health appeared to be beser than I had seen him for many years. He got about. Since he came back to Durham, he had been in much more feeble health."

J. J. Lansdell: "Dr. Smith was very frequently confined to his bed after the accident of June 15th, and complained of his side."

Upon the conclusion of this testimony his honor held that plaintiff was not entitled to recover. Whereupon the plaintiff asked and obtained leave to submit to a nonsuit, and then appealed to the supreme court, alleging for error the aforesaid intimation and ruling of his honor.

The facts being admitted or proved, the questions of negligence and of contributory negligence are questions of law.

Plaintiff's contributory negligence. Does the evidence of the plaintiff (and it is to be taken most strongly in his favor) constitute contributory negligence? and was that negligence the proximate cause of the injury? If so, the ruling of the court below was correct. If not, there was error. The plaintiff gives a clear and intelligent statement of the facts, leaving no doubt as to how the unfortunate injury occurred. The reports, English and American, abound in cases involving questions of negligence and of contributory negligence; and, as the broad mark which separates due diligence and watchful care from gross negligence and reckless carelessness is narrowed to the point where it is not easy to distinguish between ordinary care and slight negligence, many conflicting decisions are found. Even if the line could clearly and distinctly be defined, it would still, in many cases, be difficult to determine with certainty on which side to place them. We

understand the counsel who so ably represented the plaintiff to insist that if there is evidence of any negligence on the part of the defendant, whatever may be the evidence of contributory negligence on the part of the plaintiff, the issues must go to the jury, and that his honor erred in holding that, upon the testimony in the case, the plaintiff was not entitled to recover. We understand the rule to be well laid down in *Tuff v. Warman*, 94 E. C. L., 573, cited by the chief justice in *Turrentine v. Railroad Co.*, 92 N. C. 638. It is there said that the question for the jury is "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence, or want of ordinary and common care and caution, that but for such negligence and want of ordinary care and caution on his part the misfortune would not have happened. In the first place, the plaintiff would be entitled to recover; in the latter, not, as but for his own fault the misfortune would not have happened." In *Owens v. Railroad Co.*, 88 N. C. 502, cited and relied on by counsel for the plaintiff, it is said, giving the authority for it, that, "if negligence appears by the plaintiff's own testimony, the defendant might rest on it as securely as if proved by himself." Again, citing *Robinson v. Gary*, 28 Ohio St. 241: "It is only when the injury is shown by the plaintiff, and there is nothing that implies that his own negligence contributed to it that the burden of proving contributory negligence can properly be said to be cast on the defendant; for, when the plaintiff's own case raises the suspicion that his own negligence contributed to the injury, the presumption of due care on his part is so far removed that he cannot properly be relieved from disproving his own contributory negligence by casting the burden of proving it on the defendant. . . . The question should be left, upon the whole evidence, to the determination of the jury, with the instruction that the plaintiff cannot recover if his own negligence contributed to the injury." Of course, if there be no dispute about the facts, and in law they constitute contributory negligence,—and that is a question for the judge,—he must instruct the jury that the plaintiff cannot recover. In *Harris v. Railroad Co. (Mo.)*, 27 Am. & Eng. R. R. Cas. 216, it was held, as we have held in *Wallace v. Railroad Co.*, 98 N. C. 494, *ante*, p. 553, that the dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers. In that case the train (a freight train, with a caboose attached for passengers) had stopped to do some switch-

ing, and it was held to be such contributory negligence as would bar the plaintiff's recovery, if he knew, or by ordinary care could have known, that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would be the result, and "then, without thinking about the approach of the cars, and without paying any attention to whether they were approaching or not, left his seat, and stood up in the car, and was thrown down and injured, when he would not have been had he kept his seat, or resumed the same before the cars struck." His negligence was the proximate cause of the injury. Ashe, J., in *Farmer v. Railroad Co.*, 88 N. C. 564; s. c., 20 Am. & Eng. R. R. Cas. 481, says: "If the act of the plaintiff is directly connected, so as to be concurrent with that of the defendant, then his negligence is proximate, and will bar his recovery."

The counsel for the plaintiff relies on the case of *Gee v. Railroad Co.*, L. R. 8 Q. B. 161, which was fully discussed and considered with great care, and we think bears an exact analogy to the case before us. Upon a careful examination, we arrived at a different conclusion, and can find in it nothing which is at variance with the decisions of this court. In that case, the plaintiff, being a passenger on defendant's railway, "got up from his seat, and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station, and that the pressure caused the door to fly open, and the plaintiff fell out and was injured." Two questions were left to the jury: (1) Whether there was negligence on the part of the defendant in not properly fastening the door; (2) whether there was negligence or improper or imprudent conduct on the part of the plaintiff. It appears from the case (and such we understand to be the fact) that in England railway carriages, on leaving stations, are shut and fastened from the outside, and it is the duty of the railway servant, when a train leaves a station, to see that the doors are properly fastened. It seems that the passenger, when he entered the carriage, is shut in, and the door fastened from the outside; and Grove, J., says: "The doors are so constructed, and properly so, because, if you arranged a door so that the passenger could open it from the inside, it would be an extremely perilous system. . . . Passengers would be continually opening the door, and it would be very much worse for the general safety of the public." This being so, it is said that a passenger who rises from his seat to look and to view the scenery, or for any other lawful purpose, "has a right to assume, and is justified in assuming, that the door is properly fastened; and if, by reason of its not being properly fastened, his lawful act causes the

door to fly open, the accident is caused by the defendant's negligence." There was no negligence on the part of the passenger. It was held in *Bridges v. Railroad Co.*, L. R. 6 Q. B. 337, cited in that case, that if facts are disclosed in the plaintiff's case, the truth of which is not disputed, and which, if true, clearly show that the plaintiff contributed to the accident, then the judge may nonsuit, not because he can take upon himself to find the contributory negligence proved, but because in such a case the plaintiff fails upon an issue which lies upon him, viz., the issue whether the damage is caused by the negligence of the defendant.

There is no dispute, in the case before us, as to how the injury occurred. The plaintiff was sitting on the arm of the seat when the engine and freight cars were thrown back against the coach with a sudden shock, and the plaintiff says that "there is a great deal more jolting and bumping in the coupling of freight trains than in passenger trains, and I knew it. I knew, when I got on the arm of the seat, that the freight cars had not been coupled to the passenger coaches, and that they were to be coupled." If the negligent and thoughtless act of the plaintiff was the contributory and proximate cause of the injury, as we think the undisputed facts show, there was no error in the ruling of his honor. No error.

See *Wallace v. Western N. Car. R. Co.*, *ante*, p. 553; *Quackenbush v. Chicago & N. W. R. Co.*, and note, *ante*, p. 545; *Lakin v. Oregon Pac. R. Co.*, *ante*, p. 500.

ALLERTON

v.

BOSTON AND MAINE R. CO.

(*Massachusetts Supreme Judicial Court, March 2, 1888.*)

Passenger—Termination of Relation.—A passenger who had reached his destination, had alighted from the train, had taken a position upon the sidewalk of the highway, and had started to cross the track but not upon his way to the station, and who was injured while so crossing, had ceased to be a passenger before the accident.

Personal Injuries—Contributory Negligence—Look out for Approaching Trains.—A person who started to cross a double-track railroad immediately after the passage of one train without looking for the approach of another, was guilty of negligence contributing to injuries sustained by being run down while attempting to cross, especially where the gates upon

the highway were down, and the train which struck him approached slowly with the brakes set, preparatory to stopping, and must have been observed if any watch had been kept for it.

Same--Pleadings--Variance.—A recovery for personal injuries cannot be had under a statute conferring a 'right of action where a person is injured at a crossing of a highway at grade, and the employees in charge of the engine neglect to ring the bell or blow the whistle, when the counts in the declaration are founded upon other statutory provisions, which make a railroad company liable for the loss of the life of a passenger through its negligence or for the life of a person in the exercise of due diligence and not a passenger.

ON exception from Superior Court, Suffolk County.

Tort by Catherine Allerton, administratrix of the estate of Sarah W. Lawrence, against the Boston & Maine Railroad Company, for damages for the negligent killing of plaintiff's intestate. The trial judge directed the jury to return a verdict for the defendant. The facts of the case appear in the opinion.

C. G. Fall for plaintiff.

S. Lincoln and *W. I. Badger* for defendant.

KNOWLTON, J.—The plaintiff's intestate had ceased to be a passenger before the accident which caused her death. She had reached her destination, had alighted from the train, had taken a position upon the sidewalk of the highway, and thence had started to cross the track, along the street, not upon her way to the defendant's station, but to some other place which she had in mind. Was there any evidence at the trial that she was in the exercise of due care? It is well-established law, in this commonwealth and elsewhere, that one who starts to cross a railroad track without looking for approaching trains, unless he has a good reason for not looking, is not in the exercise of proper care. And this rule has been repeatedly applied to persons crossing a double-track railroad, who have started immediately after the passage of one train, without looking for the approach of another. *Bancroft v. Railroad Corp.*, 97 Mass. 375; *Mayo v. Railroad Co.*, 104 Mass. 141; *Warren v. Railroad Co.*, 8 Allen, 227; *Wheelwright v. Railroad Co.*, 135 Mass. 225; s. c., 16 Am. & Eng. R. R. Cas. 315. There is nothing in the case at bar to relieve the plaintiff from the operation of this rule. The gates upon the highway were down, as a warning that the tracks were in use, and that it was not safe to cross. As soon as the train from which the plaintiff's intestate had alighted, passed on, she started to cross, without waiting for the gates to be raised, and without looking to see whether a train was approaching upon the other track.

Facts—Contributory negligence.

The evidence shows that if she had looked after the first train passed, she could not have failed to see that by which she was afterwards struck. The latter train, when it met the former one, was going at the rate of five to seven miles an hour, with its atmospheric brake on, about to make the stop at the station. She must have known that this was a double-track railroad, upon which trains running in each direction were always to be expected. There was no express or implied invitation to her to cross, nor any excuse for her crossing without looking for a coming train. There was no evidence in the case to warrant a finding that she was in the exercise of due care.

The declaration contains two counts, the first alleging that the plaintiff's intestate was a passenger, and claiming under that part of Pub. St. c. 112, § 212, which makes a railroad corporation liable when the life of a passenger is lost through its negligence or the gross negligence of its servants or agents; and the second claiming under that part of the same section which creates a liability when the life of a person in the exercise of due diligence, and not a passenger, is lost by reason of such negligence. This last count contains all the allegations appropriate to a claim under this branch of the statute, and no others. Section 213 of the same chapter creates a liability in a particular class of cases, where a person is injured by collision with the engines or cars of a railroad corporation at a crossing of a highway or townway at grade, and it appears that the corporation neglected to ring the bell or blow the whistle as required by law, and such neglect contributed to the injury. In such cases the person injured may recover, unless it appears that he was, at the time, guilty of gross or wilful negligence, or was acting in violation of law, and that such negligence or unlawful act contributed to the injury. The declaration does not contain the allegations necessary to bring the case within this section. It is nowhere alleged in it that the accident occurred at a crossing of a highway or townway, or that the injury was by collision with an engine or car of the defendant. On the contrary, the averments of both counts follow the precise language of those parts of section 212, under which they were respectively brought. Under the last count, there are certain specifications of negligence which do not change the character of the count, nor contain the allegations material to a claim under section 213. The suit must therefore be deemed to have been brought under section 212, and the plaintiff could not hold the defendant to answer under the provisions of section 213. *Wright v. Railroad Co.*, 129 Mass. 440. The superior court has ample power to allow

Pleadings—
Variance.

amendments in all cases pending therein, and if the plaintiff at the trial had thought her action maintainable under that section of the statute, and had desired to avail herself of its provisions, she should have applied for leave to amend her declaration. In the opinion of a majority of the court, the entry must be, exceptions overruled.

See *Robostelli v. New York, etc., R. Co.*, and note, *ante*, p. 515.

CITY RAILWAY CO.

v.

LEE.

(*New Jersey Court of Errors and Appeals, July 31, 1888.*)

Passenger—Street Cars—Duty of Company—Contributory Negligence.—In an action for damages for personal injuries, it appeared that plaintiff was a passenger on an open car on which there was only standing-room on the foot-board along the outside of the car. Other passengers occupied this foot-board besides the plaintiff. At the point where the plaintiff embarked there was only a single track. Further on, where the track was double, a car of like form, carrying passengers upon the foot-board passed the car upon which the plaintiff was, but the space between the cars was not sufficient to allow them to pass with safety when persons were standing upon the foot-boards of both cars, and the plaintiff was injured by coming in contact with a passenger standing on the foot-board of the other car. The plaintiff was not familiar with the construction of the road. *Held*, that there was no evidence justifying a nonsuit on the ground of plaintiff's contributory negligence.

ERROR to Circuit Court, Mercer County.

Action by William H. Lee against the City R. Co. to recover damages for personal injuries. Defendant brings error to review a judgment for the plaintiff. The opinion states the facts.

H. N. Barton and Barker Gummere for plaintiff.

Buchanan & Robbins for defendant.

KNAPP, J.—The plaintiff below became a passenger on an open car of the defendant company, which at the time had
Facts. passengers on board in number sufficient to occupy all the seats. When the plaintiff was invited to go on board the car, there was no other room than a standing-place on the running-board along the side of the car. Other

passengers stood upon the running-board of the same as well as the other side of the car. At the point where the plaintiff embarked there was but a single track. Further on, in the direction the car was travelling, the track was double. A car of like form on the other track, and carrying passengers upon the running-board, met the car which carried the plaintiff. The space between the two cars was not sufficient to permit persons to pass with safety standing upon the inner running-boards of the passing cars, and in the passage of these cars the plaintiff was thrown by contact with a passenger standing on the running-board of the other car, and was injured. For this, suit was brought, and the plaintiff recovered damages. To reverse the judgment, this writ of error is brought.

The bill of exceptions sealed and sent with the record in this case presents the question whether the trial court erred in law in refusing to nonsuit the plaintiff at the close of his case in response to the request of the defendant. The suit was for negligent injury to the plaintiff below (the defendant here), received by the defendant while a passenger on a car of the plaintiff, being transported over its line. It is not contended seriously that, at the close of the defendant's case, there was not evidence to go to the jury in support of the averred negligence of the company. The ground relied upon in the defendant's defeat was that he, by his own carelessness, materially contributed to his own injury, and that this appeared in the evidence in his own behalf. There is no doubt as to the legal rule that negligence on the part of a plaintiff such as contributes to the injury of which he complains, when discovered through his own testimony, will preclude his right of recovery.

Railroad Co. *v.* Moore, 24 N. J. Law, 268, 824; Runyon *v.* Railroad Co., 25 N. J. Law, 556; Drake *v.* Mount, 33 N. J. Law, 441; Railroad Co. *v.* Matthews, 36 N. J. Law, 531; Railroad Co. *v.* Toffey, 38 N. J. Law, 525. And it is also settled that a refusal of the court to nonsuit on request, where such ground exists for the motion, is legal error. Railroad Co. *v.* Ward, 47 N. J. Law, 560; s. c., 25 Am. & Eng. R. R. Cas. 359. Whether, then, the court was wrong in its refusal to nonsuit must depend on the existence in the testimony of such proof of fault and imprudence on the part of the defendant exposing him to injury as in the eye of the law is culpable. If the testimony left that question in doubt, it was for the jury, and not the court, to determine. To determine this, the facts which are not in dispute must be adverted to. The defendant was riding upon an open car drawn by two horses. When he was invited to enter, the seats and platform of the car were filled, and he was obliged to take his place, with others, on the foot-

Contributory
negligence—
Failure to
grant non-
suit.

board, running longitudinally with the car. The roof of the car was supported by stanchions, or posts, opposite to one of which the defendant placed himself. At the point where he entered this car the company had but a single track. Further on, the track was double, with a space of two feet eleven inches between the nearest rails of the two tracks. Two cars of the sort the defendant was riding on, passing each other on this double track, would be separated by about ten inches along the edges of the two nearest foot-boards, which foot-boards were about nine inches wide each. A person might stand on one foot-board, and pass a car on the other track, without injury if the foot-board of the car on such other track were free from passengers. There was not room for persons standing on these foot-boards to pass each other in safety if both foot-boards were occupied by passengers. The plaintiff below was knocked off his car, and injured, by colliding with a passenger standing on the foot-board of a like car of the company passing in an opposite direction along the double track. The plaintiff in error contends that the position of the defendant was obviously so dangerous a one that to take it was in *in se* negligent. The plaintiff below was a stranger to this road, unfamiliar with its construction, equipment, and management. Where he entered the company's car, the track was single, and there is nothing shown to indicate knowledge on his part that it was different elsewhere. He was invited by the agent of the company to take a position on the car and, when so invited, the only position left for him was that which he assumed. It was therefore taken with the assent of the company's agent. It appears to be the practice of the company to carry passengers there. Not only on the car which he boarded, but on the car with which he collided, passengers were being carried in the same way. The mere fact of riding on a platform of a street car is no conclusive proof of negligence. *Nolan v. Railroad Co.*, 87 N. Y. 63; *Meesel v. Railroad Co.*, 8 Allen, 234; *Fleck v. Railway Co.*, 134 Mass. 481; s. c., 16 Am. & Eng. R. R. Cas. 372. In *Meesel v. Railroad Co.*, *supra*, it is truly said "that the seats inside the car are not the only place where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside the car until the car is full, then to stand upon the platforms until they are full, and continue to stop and receive them even after there is no place to stand except on the steps of the platform. Neither the officers of this corporation, nor the managers of the cars, nor the traveling public seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained upon the ground of its danger. There is, therefore, no basis

upon which the court can decide on the evidence that the plaintiff did not use ordinary care." In that case the plaintiff was injured by being thrown from the platform of a moving car. It has been asserted as a rule of law, that a carrier who assigns a passenger in his charge to a position of danger may not, in case of injury, set up the passenger's acceptance of such a position as contributory negligence, but is estopped from so doing. A rule so broadly stated must admit of many exceptions. The duty of a carrier in transporting passengers is one which calls for a high degree of care, but it is not one amounting to absolute assurance of safety. He has not control of the person of the passenger. He has the right to adopt and enforce reasonable rules for the safety of his passengers, and to these, when made known to him, the passenger is bound to conform. The passenger is at liberty to conclude that rules or directions of the carrier, assigning him to place or position, are subservient to the duty which the carrier owes him, and that he may take such position in safety, unless to do so would be a blind surrender of care and judgment for his own safety, or an inexcusable failure to use his senses to that end. It certainly cannot be contributory negligence that he, at the invitation of the defendant, exposed himself to risk of danger created by the defendant, and of which he did not know, and of which no warning was given. The position of this outside platform undoubtedly was attended with some risks and exposures. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing; and, had the plaintiff received his injury from such cause, it may be that negligence contributing to his injury would be imputed to him. But he was not presumed to know that the company's road was so constructed, or its cars so new, as to render a position in which it invited him to ride a dangerous one. If the question of contributory negligence was raised by the case, it was one for the jury, and there was no error in refusing to nonsuit, and submitting that question to them. The judgment should be affirmed.

See *Hill v. Ninth Ave. St. R. Co.*, and note, *ante*, p. 522; *Topeka City R. Co. v. Higgs*, and note, *ante*, p. 529.

INTERNATIONAL AND GREAT NORTHERN R. CO.

v.

UNDERWOOD.

(*Texas Supreme Court.*)

Passenger—Personal Injuries—Complaint—Sufficiency.—A complaint in an action to recover for personal injuries sustained by a passenger, which alleges a contract to transport the plaintiff over the line of defendant's road, but does not specifically allege that the point at which the accident occurred is between the place of departure and that which defendant contracted to carry plaintiff, is sufficient on demurrer, if it appears from the complaint that plaintiff received the injuries complained of while being carried under the contract.

Same—Lease of Road—Liability of Lessor.—A railroad company has no power to lease or transfer the control of its road without statutory authority, and a plea by the lessor of a railroad, in an action to recover damages for personal injuries, that it had leased the railroad at the time of the accident, is not sufficient, except the defendant pleaded a special act conferring the power, or unless authority to do so be conferred by the general statute.

APPEAL from Circuit Court, Bexar County.

Action to recover damages for personal injuries. The case is stated in the opinion.

McLeary & Barnard for appellant.

Houston Bros. for appellee.

GAINES, J.—This action was brought in the court below by appellee against appellant, to recover damages for personal injuries. The statement of facts having been stricken out on motion of appellee at the last term of this court, there are many questions raised in appellant's brief which we need not consider. By its first and second assignments of error, appellant complains that the court erred in overruling its general and special demurrers to plaintiff's petition. The main ground of the demurrers is, "that the petition nowhere alleges that the defendant undertook to transport plaintiff as far northward from San Antonio as Corbin station, where the accident is alleged to have occurred." The allegations in the petition in reference to this matter are "that heretofore, to wit, on or about the third day of July, 1883, the defendant, acting as a common carrier of passengers and freight, for a valuable consideration, undertook to transport the plaintiff as a passenger over the said line of road northwards from San Antonio, towards St. Louis,

Missouri; that the plaintiff, on said third day of July, 1883, at the instance of defendant, and under the instructions and directions of its officers, agents, and employees, entered the car, or 'caboose,' of the defendant, provided for his use and occupancy, and the defendant, acting through its agents, officers, and employees, started said car and train on its journey over its line of road to the northward; that the plaintiff conducted himself in a prudent manner, and was guilty of no negligence or imprudence whatever; that when said car and train reached Corbin station, about 20 miles, more or less, from San Antonio, on the defendant's line of road, which was about 11 o'clock at night on said date, the defendant, by its gross negligence and outrageous carelessness in the management and running of the trains on said road, caused the car on which the plaintiff was, it being the car furnished by the defendant for his use and occupancy, to be run into by another engine and train of said defendant, breaking the said car, scalding, burning, bruising, wounding, and crippling this plaintiff, throwing him from said car, dragging him upon the track and road-bed, breaking his bones, crushing his body and limbs, tearing his clothes, and mutilating him in a horrible manner."

It is true that it is not here specifically alleged that the point at which the accident occurred is between the place of departure and that to which it was contracted that plaintiff should be carried. But we think that it appears from the averments, that the plaintiff received the injuries complained of while he was being carried by defendant, under its agreement, and that greater particularity than this cannot be required. We are of the opinion, therefore, that the exceptions to the petition upon this ground were properly overruled.

Sufficiency of
complaint.

There were other special exceptions to the effect that the averments of the petition were not sufficient to warrant a judgment for exemplary damages, as therein claimed. But plaintiff distinctly waived his claim for such damages upon the record before the trial of the cause; and it seems from the appellant's briefs that the exceptions based upon this ground were not insisted upon in this appeal.

It is complained by the fourth assignment, that the court erred in sustaining plaintiff's exceptions to so much of the defendant's answer as set up a lease for 99 years, made in 1881, by the defendant company to Missouri, Kansas & Texas R. Co., of defendant's road and property, and a subsequent lease by that lessee to the Missouri Pacific R. Co., which last-named corporation defendant averred was operating defend-

Lease of road
—Authority
to lease—
Pleading.

ant's road at the time the accident occurred. This assignment was not well taken. It was held by the court in the cases of *Gulf, C. & S. F. R. Co. v. Wheat*, and of *Central & M. R. Co. v. Morris*, 28 Am. & Eng. R. R. Cas. 50 (decided at the last Galveston term), that, without authority conferred by statute, one railroad company could not lease its road to another so as to absolve itself from its obligations to the public. Where one such company, without such authority, surrenders the control of its line to another, it becomes liable for the torts of the company operating it which are committed upon its line.

The case of the *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549, cited by council for appellant, is not in conflict with this opinion. That action was brought both against the Missouri Pacific R. Co. and the International & Great Northern R. Co., and the court then say: "It is alleged and shown that, at the time of the injury, the appellee was the servant of the Missouri, Kansas & Texas R. Co. That company had previously leased the road and property of the International & Great Northern R. Co., and was in charge of and operating the same at the time of the injury. 'The leasing of a railroad, under due authority of law, affects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from liabilities for the lessee's torts.' *Pierce R. R.* 283, and note 6. In accordance with that doctrine, the International and Great Northern R. Co. would not be liable to the appellant for the damages arising from the injury."

The proposition that the owner is absolved from liability when the lease is duly authorized by law is not to be disputed; but that, without a statute conferring that power, a railroad company cannot lawfully lease and transfer the control of its road, is settled by the cases we have previously cited. We have been referred to no general law of our legislature authorizing such lease. If any private act existed, defendant should have pleaded it, so as to show that the lease was lawfully made. This not having been done, we conclude that the leases were not warranted by law, and hence that the court did not err in sustaining the exceptions to so much of the answer as set up that the defendant's railroad was being operated by the Missouri Pacific R. Co. at the time of the injury.

The sixth assignment of error is that "the court erred, in the sixth paragraph of its charge to the jury, in stating the **Assessment of damages.** rule for assessing the damages differently from the claim made in the petition. The items as stated in the charge, do not correspond with the items as stated

in the petition, as they should do." This assignment is not well taken. The elements of damages which the jury were instructed by the court to take into consideration are substantially the same as those alleged in the petition.

The other assignments which allege error in the action of the court, in giving and refusing instructions, are of such a nature that they cannot be considered in the Other assignments. absence of a statement of facts. Without knowing what evidence was adduced upon the trial, we cannot say that there was error in either of the particulars complained of in these assignments. The other assignments call in question the sufficiency of the evidence to sustain the verdict, and, without a statement of facts, cannot be considered.

In a written argument, filed since the statement of facts was stricken from the record, we are asked to reverse the judgment; because, as is claimed, the judge who tried the cause below failed to make out and certify a statement of facts within the time required by the Failure of judge to certify statement of facts. statute. The trial was had in December, and the court did not adjourn until the ninth day of March. On the morning of that day counsel of plaintiff and defendant each presented the judge with a statement of facts, stating that they could not agree. Ten days were allowed for preparing and filing the statement, but this was not done until the fifth day of April, when he certified a statement, and directed the clerk to file it as of the ninth of March, and at the same time made a certificate to the foregoing facts, as well as to the further fact that he had prepared the statement as soon as his "other engagements would admit." Appellant treated the paper so prepared and filed, as a statement of facts, and brought it up in the record. The action of the court was neither excepted to, or assigned as error, and is nowhere complained of except in the written agreement. It is obvious we cannot revise it. If error at all, it is not of that fundamental character which it is our duty to consider without an assignment specifically pointing it out. It is to be remarked, however, that the court continued in session for more than two months after the case was tried, but more than one month after the motion for a new trial was overruled. The statement prepared by counsel, not having been presented to the judge until the last day of the term, it may be doubted whether appellant could have complained, if the judge had at that time refused either to make out and certify a statement, or allow additional time for that purpose.

We find no error in the judgment, and it is affirmed.

No Power to Lease Road Unless by Statutory Authority.—See note, 32 Am. & Eng. R. R. Cas. 410.

MAXWELL

v.

ATCHISON, TOPEKA, AND SANTA FÉ R. CO.

(U. S. Circuit Court, Eastern District Michigan, March 19, 1888.)

Passenger—Expulsion from Train—Jurisdiction of Action.—A cause of action arising from the wrongful expulsion of a passenger from a train, arises, not where the contract of carriage is made, but at the place where the passenger is wrongfully expelled.

Writ—Service—Foreign Corporation—Agent.—Service of process, in an action against a foreign railroad corporation, cannot be made upon an agent whose authority is limited to soliciting business, although such agent may have been employed by the defendant for the purpose of compromising the suit.

Personal Injuries—Federal Courts—Jurisdiction.—Under the act of congress of 1875, which makes it the duty of a federal court to dismiss any action when it appears to its satisfaction that the suit does not really and substantially involve a dispute properly within its jurisdiction, the circuit court will not entertain an action of tort for the recovery of damages for personal injuries, when it is obvious upon the pleadings that the amount of the recovery would be less than \$2000.

THIS was an action of trespass upon the case to recover damages for the alleged expulsion of the plaintiff from one of defendant's passenger cars within the State of Kansas. Plaintiff, who is a resident and citizen of this county, brought from the Wabash Company in Detroit, a ticket for Denver, Colo., and return. This ticket was composed of several coupons, one of which entitled him to be transported over the railroad of the defendant in the State of Kansas. The expulsion took place on his return from Denver. Defendant pleaded to the jurisdiction of the court: First—That defendant is a corporation organized under the laws of Kansas, and has no agent in this State upon whom process could be lawfully served; that George E. Gillman, upon whom such process was served, has desk room, for which this defendant pays, in a coal office in this city, and has merely authority to solicit persons intending to travel in Kansas to patronize the defendant road; that he has no authority to sell tickets, and is not clothed with any agency whatever from this defendant, except as such solicitor. Second—That the ejection of the plaintiff charged in the declaration took place in the State of Kansas; that Gillman did not solicit the plaintiff to travel upon the defendant road, and

neither the purchase of the ticket nor the cause of action grew out of the agency of said Gillman as passenger agent. To this plea plaintiff replied: First, that Gillman was an agent of the defendant within this State, and was represented by the defendant upon one of its printed folders as a "passenger agent," and that the defendant recognized Gillman as such agent by authorizing him to compromise this suit against it for a specified sum; and, second, that the cause of action did accrue to the plaintiff within the State of Michigan, because the contract was made with the defendant's agent by the purchase of a ticket in Detroit to Denver and return, and was a continuing contract upon which a transitory action arises. Defendant demurred to this replication, and plaintiff joined in the demurrer.

Sylvester Larned and D. A. Straker for plaintiff.

Alfred Russell for defendant.

BROWN, J.—Two questions are presented by the pleadings in this case: First, whether Gillman was such a representative or agent of the defendant company that such company can be said to be "found" within this district, within the meaning of the act of Congress; second, whether this court has jurisdiction of an action for a trespass committed upon the plaintiff in another State. The defendant is a corporation organized under the laws of Kansas, and its several lines of railway run westward from the Missouri river. It was represented in Detroit by Gillman, who is described upon its folders as a "passenger agent." His business is to solicit passengers for the defendant, but he has no authority to sell tickets. He also seems to have been employed by the defendant to effect a settlement of plaintiff's claim, and, in pursuance of his instructions, made an offer of compromise. It does not appear to me that the law of this State with respect to suits against foreign corporations (How. St. § 8145) cuts any figure in the case, since it provides for service of process upon the agent of a foreign corporation only where the cause of action arises within this State. I am clearly of the opinion that the cause of action arises, not where the contract is made, but where it is broken; and that, as the expulsion of the plaintiff took place in the State of Kansas, the cause of action must be deemed to have arisen there. But, in addition to that, the statute provides that service may be made upon any officer or agent of the corporation; and the question, Who shall be deemed an "agent" within the meaning of the statute? is left an open one, to be determined irrespective of the statute.

Questions presented.

Service of process—Cause of action arose in Kansas.

The general rule appears now to be well settled, that a foreign corporation may be sued within any jurisdiction where-
in it carries on an important part of its business.

Agent upon
whom process
may be served
—Foreign cor-
poration.

Where, under the laws of the State, it is required as a condition of doing business within the State that it shall appoint an officer or agent upon whom process may be served, such corporation is always treated as "found" with the State within the meaning of the judiciary act; and suits in the federal courts may be instituted by service upon him. *Ex parte Schollenberger*, 96 U. S. 369; *Brownell v. Railroad Co.*, 3 Fed. Rep. 761; *Runkle v. Insurance Co.*, 2 Fed. Rep. 9; *Knott v. Insurance Co.*, 2 Woods, 479; *Fonda v. Assurance Co.*, 6 Cent. Law J. 305. On the other hand, when an officer of a foreign corporation is temporarily visiting or travelling within the State, it is equally well settled that service of process against the corporation cannot be made upon him if the corporation is not actually doing business within the State. *St. Clair v. Cox*, 106 U. S. 350; *Newell v. Railway Co.*, 19 Mich. 336. What is the character or amount of business which the corporation must do to subject its agent to the service of process within the foreign State, is left in some doubt by the authorities. If it have an office for the general transaction of its business,—the sale of its goods if it be a manufacturing corporation, or the making of contracts and the receipt of freight and passengers for transportation if it be a railroad,—it would appear to be sufficient. *Hayden v. Mills*, 1 Fed. Rep. 93; *Railroad Co. v. Harris*, 12 Wall. 65, *Railroad Co. v. Cram*, 102 Ill. 249; *Libbey v. Hodgdon*, 9 N. H. 394. So it was held that the circuit court of Illinois had jurisdiction of an action against a beef-canning corporation organized under the laws of Missouri, which owned a slaughter-house and stock-yard within the State of Illinois, where beef to be canned was slaughtered and dressed for and in the name of the company. *Packing Co. v. Hunter*, 7 Rep. 455. So in *Williams v. Transportation Co.*, 14 O. G. 523, it was held that the station agent of a foreign transportation company was a representative upon whom process might be served, though he had nothing to do with the construction or operation of the cars, nor with the running of the same; his duty being merely to keep the books of the company, to collect the amount due for freights received and shipped, and to make returns of the same to the office of the company at Philadelphia. In that case the State law provided that actions might be brought against foreign corporations by service of process upon any officer, director, agent, clerk, or engineer. The same principle has been applied to foreign insurance companies having

an agent within the jurisdiction of the court, with power to receive premiums and issue policies. *Moch v. Insurance Co.*, 10 Fed. Rep. 696; *Moulin v. Insurance Co.*, 25 N. J. Law, 57; *Michael v. Insurance Co.*, 10 La. Ann. 737. Upon the other hand, if the agent be a local one, with authority only to receive applications and give receipts for the same, it has been held that service upon such agent is insufficient to bind the corporation. *Weight v. Insurance Co.*, 30 La. Ann. 1186.

Much the strongest case in favor of the plaintiff is that of *Block v. Railroad Co.*, 21 Fed. Rep. 529. This was also an action for an injury received in Kansas through the negligence of this same defendant. The defendant's road did not run into the jurisdiction, but it had an office in Kansas City and St. Louis. Service was made upon the officer in charge of the company's office at St. Louis. Judge Brewer held that as the corporation had an established business office and agency within the district, and an agent employed for the purpose of furthering the transportation business of the corporation, the corporation might be considered as found wherever such office and agency was established. By reference to the folders of the company, it will appear that these were general agents, with authority to make contracts and sell tickets for the company, and not mere solicitors of business, as in this case. In England the rule is that if the foreign corporation has a place of business, or a subordinate board of directors acting for the corporation in England, it may be sued there. *Newby v. Manufacturing Co.*, L. R. 7 Q. B. 293. The English courts, however, are less liberal in their application of this rule than our own. By statute, process against private corporations must be served upon the head officer, clerk, treasurer, or secretary; and in *Mackereth v. Railway Co.*, L. R. 8 Exch. 149, it was held that service upon a ticket agent of a Scotch railway at Carlisle was insufficient to charge the corporation, notwithstanding it ran its cars into the railway station at that place.

The general subject of the power of the federal courts to entertain suits against foreign corporations received a very exhaustive consideration by Judge Jackson in *United States v. Telephone Co.*, 29 Fed. Rep. 17. This *U. S. v. Telephone Co.* reviewed. was a bill in equity against the Bell Telephone Co. The marshal returned service of process by delivering a copy of the subpoena to the vice-president of the Cleveland Telephone Co., such company being an agent and partner of the Bell Telephone Co., within the northern district of Ohio. The learned judge held the service to be insufficient, and in delivering the opinion observed—

“That, in the absence of a voluntary appearance, three

conditions must concur or coexist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held, viz.: First, it must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; second, that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and, third, the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, expressed or implied, of doing business in the State."

It is evident that this ruling is fatal to the maintenance of the case under consideration, inasmuch as by the State law jurisdiction is given over foreign corporations only where the cause of action arises within this State. I have already held that the cause of action in this case arose within the State of Kansas. But even if it be conceded that jurisdiction might be maintained, irrespective of the State statute, wherever service could be made upon an authorized agent of the corporation, it does not seem to me that the business which the defendant carried on in this State was of such a character as to make it amenable to suits within this jurisdiction. Gillman was not an officer and managing agent, or even a ticket agent, of the company. He had no independent office or place of business, but simply occupied a desk in a coal office. His authority was limited to soliciting business,—to turning, as far as he could, the tide of western travel over the defendant road. In fact, he was a mere runner. From the folders of the company, it appears that it has agents of this description in at least a dozen different States. If it can be sued in this State for a cause of action arising in Kansas, it is equally amenable to suit in any one of these States in which it may happen to have a passenger agent for soliciting business. It would, in my opinion, be an unwarranted extension of the law of constructive presence, to hold the road liable to suit in all these different States as a corporation inhabitant or found therein. The same principle would make every manufacturing or trading corporation liable to suit in any State in which it sent a commercial agent, or "drummer," to solicit patronage.

There is another point with respect to our cognizance of this case, which does not properly arise upon these pleadings, but may perhaps be alluded to here in view of the facts stated by counsel upon the argument. I have grave doubt whether the amount of damages is sufficient to give the court jurisdiction.

Jurisdiction
of federal
court.

While the general rule announced in *Gordon v. Longest*, 16 Pet. 97, is unquestioned, that in actions of tort the amount

claimed in the declaration is the test of jurisdiction, this case must be construed in connection with the act of 1875, the fifth section of which makes it the duty of the court to dismiss the case when it shall appear to its satisfaction that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction. This duty was dwelt upon and enforced in the case of *Williams v. Nottawa*, 104 U. S. 209. I have had frequent occasion to apply this rule in actions upon contract, and also in actions of ejectment, where it clearly appeared that the value of the land in controversy was less than the minimum jurisdictional amount. I know of no reason why the same rule should not be applied in actions of tort, except that in such cases the damages are not susceptible of mathematical computation, and are more largely in the discretion of the jury than in actions upon contract. I apprehend, however, there is still some discretion in this class of cases. Suppose an action were brought for a manifestly trivial injury, such as a bruise or a sprained ankle, and the court can see that by no possibility could a verdict for \$2000 be sustained,—I know of no reason why it should not refuse cognizance of the case, and remit the parties to their proper forum. Indeed, it seems to me that whenever it appears clear from the plaintiff's own statement, or the testimony of his witnesses, that a verdict of \$2000 would be so grossly excessive as to require the court, in the exercise of its judicial discretion, to set it aside and direct a new trial, it is equally its duty to dismiss the case for want of jurisdiction. In the case under consideration, the plaintiff was not actually ejected from the cars. The conductor refused to receive his ticket, and threatened to eject him, but after some trouble delay he succeeded in borrowing \$15 from a fellow-passenger, with which he paid his fare to Detroit, and was permitted to continue upon the same train. He was undoubtedly subjected to some inconvenience from his inability to procure food. He alleges, and I am bound to presume, that he suffered from the pangs of hunger; at the same time, upon his own statement, it appears to me exceedingly improbable that he could obtain a verdict for \$2000, and equally improbable that such a verdict could be sustained if it were rendered. It is not necessary, however, to pass upon this question. I make the suggestion, rather, as an intimation of what I propose to do in cases of this description. The time of the court is largely taken up in the trial of negligence cases in which the amount recovered is less than \$1000; and the only penalty seems to be that a party shall not recover costs if the amount of the verdict be less than \$500, unless there is power to apply the summary remedy which I have indicated. This power I

propose to exercise where it clearly appears to me that the action should not have been brought here.

An order will be entered sustaining the demurrer to the replication, for the reason that the defendant was not found within this district.

Service of Process on Agents of Foreign Corporations.—See *Central R. & B. Co. v. Carr*, 23 Am. & Eng. R. R. Cas. 487; *Chaffee v. Rutland R. Co.*, 16 Ib. 408; *State v. Pennsylvania R. Co.*, 1 Ib. 626; *Stout v. Sioux City, etc.; R. Co.*, 2 Ib. 645; *Mohr v. Insurance Co's*, 6 Ib. 620.

WEBBER

v.

HERKIMER AND MOHAWK STREET R. CO.

(109 N. Y. 311).

Passenger—Negligence—Limitation.—An action to recover damages for personal injuries sustained by a passenger by being struck by a telegraph pole and thrown from a street car, while passing along the outside platform of the car at the command of the conductor, is an action to recover damages for personal injuries resulting from negligence and falls within the limitation of three years applicable to actions for personal injuries resulting from negligence, prescribed by New York Code of Civil Procedure, sec. 382, subdivision 3.

APPEAL from General Term of Supreme Court for the Fourth Department.

Action by Rodney C. Webber against Herkimer & Mohawk Street R. Co. to recover damages for personal injuries. The plaintiff appeals from a judgment for the defendant. The case is stated in the opinion.

A. B. Steele for appellant.

Samuel Earl for respondent.

GRAY, J.—The plaintiff's complaint, in substance, alleged the making of an agreement between himself and the defendant, a street-railroad company operating as common carriers of passengers between the villages of Herkimer and Mohawk, in this state, by which on June 23, 1879, the defendant, having received him into its car, for a certain compensation then paid by him, undertook and agreed with him to transport him, with care, diligence, and safety to his

Facts.

person, from Herkimer to Mohawk, and that its cars, road, and appurtenances thereto, were safe, suitable, and proper for the accomplishment of that undertaking. It further alleged that the defendant omitted and neglected to perform its said undertaking, and violated the same, in the respect that its car was so constructed that, while in motion, a passenger could not pass from one end to another without stepping outside on a side platform; and that, while on his journey, and in the night-time, the conductor ordered plaintiff to move from the rear end of the car to the front end. While complying with this direction, and in passing along said outside platform, plaintiff was struck by a telegraph pole, crushed against, and thrown from the car into a ditch, and was greatly injured. It alleged that the defendant's servants were well aware that at a certain part of the road the telegraph poles were so near to the track as to make it dangerous for any person to be on the outside platform of the car while passing that point; and that, in ordering plaintiff to move, defendant's servants neglected to warn him of the close proximity of the telegraph poles; and that he was injured without fault on his part. The complaint then alleged the nature and extent of his injuries, and the amount of damages sustained. The answer, among other defences, set forth that this action was brought to recover damages for a personal injury resulting from negligence, and that the cause of action did not accrue within three years next before the commencement of the action. When the case came on for trial, it was conceded that the action was commenced on the 6th day of March, 1883, and the court held that the statutory defence pleaded by the answer was applicable to the case, and ordered a verdict for defendant. The plaintiff excepted to this ruling and order, and also to the refusal of requests to be allowed to go to the jury.

The sole question for our review is the correctness of the judge's ruling upon the application of the statute of limitations set up in defendant's answer as a bar to the action. Plaintiff's counsel contends that the cause of action arises upon a "contract obligation" of the defendant, and that subdivision 1, § 382, Code Civil Proc., provides that such an action may be brought within six years. He argues that the *gravamen* of the action, and foundation of the claim, are the contract or undertaking of the defendant, and that defendant was under no obligation to him excepting that arising therefrom and that subdivision 5 of section 383, being intended to apply to cases of liability not resting upon contracts, does not apply. It is, however, too well settled to require extended discussion

Application of
statute of limitations.

at this day that common carriers of passengers are not insurers of personal safety, and that for an injury happening to the person of a passenger they are only liable for negligence in failing to use due care, diligence, or skill in and about their undertaking in order to prevent those injuries which human foresight and care can guard against. If there is any defect in the vehicle by which passengers are carried, and an injury occurs thereby, they are liable, if at all, on the sole ground of negligence. The form of the action, whether *ex contractu*, as claimed to be the case here by appellant's counsel, or *ex delicto*, does not affect the case under this statute. *Carroll v. Railroad Co.*, 58 N. Y. 126, 134. The liability of the defendant as a carrier of passengers is referable to the question of its negligence. If the passenger through any accident is injured in his person, and his freedom from fault is established, the carrier is liable to him in damages if the proofs show that the injury occurred through its negligent acts, or of those of any of its agents or servants. Section 382, c. 4, Code Civil Proc., which contains the statutory provisions for the limitation of the time of enforcing a civil remedy, fixes a period of six years for the bringing of "an action upon a contract obligation or liability, express or implied," and for "an action to recover damages for an injury to property, or a personal injury, except in cases where a different period is expressly prescribed in this chapter." The fifth subdivision of section 383 fixes a period of three years for the bringing of "an action to recover damages for a personal injury resulting from negligence." This fifth subdivision of section 383 was a new provision, and furnishes the exception contemplated in the previous section. It repealed the provision of the former statute by which a period of limitation of one year was fixed for the commencement of an action to recover damages for personal injuries. *Watson v. Railroad Co.*, 93 N. Y. 522; s. c. 15 Am. & Eng. R. R. Cas. 486. There should not be the slightest reason for misapprehending the intention of the legislature, or for misapplying the language of the sections. Where the source of the personal injury complained of is found to be in the negligence of the defendant, the action must be commenced within three years, or the statutory provision may be pleaded in bar. The learned counsel for appellant says that, if such a construction is given to the fifth subdivision of section 383, it will be difficult to mention a case to recover damages for a personal injury as provided in subdivision 3 of section 382, not covered by subdivision 1 of section 384, or by subdivision 5 of section 383. But he is quite mistaken. The third subdivision of section 382 applies to all cases where the personal injury results from acts other

than those constituting negligence in the defendant. Illustrations are not difficult to mention. Such would be a case where an injury occurred to the person of the passenger because the carrier had failed to transport him, according to its undertaking, to the point of his destination; or where it had failed to furnish suitable or proper accommodations, and physical discomforts or sickness resulted; or because of unreasonable delay or detention from which he suffered in any demonstrable way. Subdivision 9 of section 3343 defines as personal injuries, in addition to those referable to subdivision 1 of section 384, the cases of seduction, malicious prosecution, and criminal conversation. In the case at bar the cause of action arose upon the principles of the common law, and was perfect and complete when the injury occurred to the plaintiff by reason of the negligence of the defendant in the breach of its legal duty to carry the plaintiff safely, and the statutory limitation of three years commenced to run at that time, and, the action not having been brought until after the expiration of that period, the defence of the statute was perfect. The judgment appealed from should be affirmed.

All concur, except EARL, J., not sitting, and DANFORTH, J., not voting.

Application of Statutes of Limitation in action for Personal Injury.—See *Watson v. Forty-second St., etc., R. Co.*, 15 Am. & Eng. R. R. Cas. 486; *Atchison, etc., R. Co. v. King*, 15 Ib. 330; *Alabama, etc., R. Co. v. Hawk*, 18 Ib. 194.

LINCOLN BOARD OF TRADE

v.

**BURLINGTON AND MISSOURI RIVER R. CO., in Nebraska, and
CHICAGO, BURLINGTON AND QUINCY R. CO.**

(Interstate Commerce Commission, August 11, 1888.)

Interstate Commerce—Municipal Subscriptions—Undue Preference.—The fact that assistance in the shape of subscriptions by a city, and land grants by the State, have been given to a railroad company cannot be taken into consideration in considering whether such city is discriminated against, by undue preference in favor of another locality.

Same—Competing Lines—Freight Rates—Distance.—The distance from Lincoln to Chicago by the Burlington system is 535 miles, or 106 per cent of the distance to Omaha, which is 508 miles by the same route. The shortest line from Chicago to Omaha is 490 miles. *Held*, that in estimating

the freight rates from Chicago to Lincoln, the Burlington companies are not limited to a rate equal to 106 per cent of the rate to Omaha, but are entitled to charge an increased rate in view of the fact, that a shorter line exists which competes for the traffic.

COMPLAINT by the Lincoln Board of Trade against the Burlington & Missouri River R. Co. in Nebraska, and the Chicago, Burlington & Quincy R. Co. for undue discrimination in freight rates, to the prejudice of the city of Lincoln. The complaint and answer, with the facts upon which the case turns, appear in the opinion.

G. M. Lambertson and O. P. Mason for complainants.

T. M. Marquett for defendants.

WALKER, C.—The complaint now to be disposed of forms part of a complaint against the same and other companies on the docket of the Commission as No. 94. The other issues presented therein relate to east-bound trans-continental rates, and are to be separately decided.

The portion of said complaint now to be considered avers that the rates over the defendant lines from Chicago to Lincoln are unjust and unreasonable in themselves; that they are unjust as compared with the rates from Chicago to Omaha and other competing towns in Nebraska, and also as compared with rates prior to the passage of the Act to regulate commerce. It is averred that rates from Chicago to Lincoln, based on distance, would not exceed 106 per cent. of the rate from Chicago to Omaha, whereas in fact they are from 10 to 40 per cent. higher. It is also averred that Lincoln is a large jobbing point, a city of commercial importance, and in active competition with other cities of a similar class for supremacy in trade; that it is the practice of the railroads to make large business centers rate-basing points, and in so doing to consider the equitable demands of trade; that this principle has been ignored by the defendants, so that while other jobbing points have equal access to points in Nebraska and throughout the west, Lincoln, as a result of high in-rates, is confined to a very restricted territory; and that this is not the result of unfortunate location, but of discriminating tariffs. It is further claimed that in making rates from Chicago to Lincoln the defendants should consider distance as a factor, and that the ratio of the rate should decrease with the increase of the distance, a principle which it is said the defendants ignore.

The answer claims that the distances and rates are not correctly stated in the complaint; denies that the charges in question are in contravention of any of the provisions of the

Act to regulate commerce, and insists that they are just and reasonable.

The facts are found to be as follows:

Lincoln is the capital of the State of Nebraska; a city of about 40,000 inhabitants; the center of a considerable jobbing trade, in which it competes with Omaha for the distribution of all classes of goods throughout central and northern Nebraska; the seat of two packing houses and several other manufacturing establishments; the crossing or terminal point of several railroads; and it is quite advantageously situated for all commercial purposes. Facts.

The defendant companies are separate corporations which are operated in harmony and form what is commonly known as the "Burlington" system. The Chicago, Burlington & Quincy R. Co. operates the roads of that system east of the Missouri river, and the Burlington & Missouri River R. Co. in Nebraska operates those west thereof. Joint rates are made by said companies between points east of the Missouri river and points west thereof. The main line of said system runs westerly from Chicago through Burlington, on the Mississippi river, across the State of Iowa, crossing the Missouri river at Plattsmouth, and thence on through Lincoln to Denver in Colorado. Plattsmouth, Nebraska, is 21 miles south of Omaha and 487 miles from Chicago, making the distance from Chicago to Omaha over this route a total of 508 miles. Lincoln is 48 miles west of Plattsmouth, making its distance from Chicago a total of 535 miles, 106 per cent of the distance to Omaha. The Burlington line can use another route to Omaha, crossing the Missouri river at Council Bluffs, the distance by which is also 508 miles. The usual place of crossing, however, is from Pacific Junction to Plattsmouth, over a bridge owned by the "Burlington" system. Passenger trains are run via Plattsmouth and thence north to Omaha; thence southwesterly, striking the main line at Ashland, distant 30 miles from Plattsmouth and 31 miles from Omaha. Freight trains are run directly west from Plattsmouth, through Ashland to Lincoln and points beyond. Freight destined for Omaha is hauled north from Plattsmouth to that city. The shortest rail line from Chicago to Omaha is 490 miles and from Omaha to Lincoln 54 miles. On that basis the Lincoln distance is something over 110 per cent. of the Omaha distance. On the basis of the shortest route to Omaha, 490 miles, and the shortest route to Lincoln, 535 miles, the Lincoln distance is something over 109 per cent of the Omaha distance.

The various roads competing for business from Chicago to Omaha unite upon an agreed tariff to all Missouri river

points. One of those roads is the Missouri Pacific, which reaches Omaha from the south, coming from Kansas City on the west side of the Missouri river. The latter company, conforming to the requirements of the fourth section of the Act to regulate commerce, makes rates to all points on its line south of Omaha no higher than the agreed Omaha rates, thus compelling the extension of the Missouri river rates on the Burlington system to points in Nebraska where its line crosses the Missouri Pacific. One of these points is Louisville, on the main line above described, distant 23 miles west from Plattsmouth and 30 miles east from Lincoln. Another is Dunbar, 47 miles east of Lincoln on a line running to Nebraska City.

The rates from Chicago at the time the petition was filed were as follows (tariff of August 22, 1887):

	1.	2.	3.	4.	5.	A.	B.	C.	D.	E.	Lum- ber.	Hard coal.
Omaha	90	75	50	35	30	32½	29½	23	20	16	20	16.12
Lincoln . . .	1.00	84	57	41	35	40	35	28	25	21	26	18

A reduced tariff, dated December 20, 1887, became generally effective March 26, 1888, after a so-called "rate war" among the roads. This tariff was not actually in force at the time of the hearing, but the case was tried and the briefs of counsel were prepared in view of the new rates then about to become operative, and which are now in force, as follows:

	1.	2.	3.	4.	5.	A.	B.	C.	D.	E.	Lum- ber.	Hard coal.
Omaha	75	60	40	30	25	30	25	20	17½	16	16	17½
Lincoln	80	65	44	34	28	33	28	23	20½	19	19	18

By comparing the foregoing tables it will be seen that at the time of filing the petition the Lincoln rates ranged from 10 cents to 4 cents higher on the various classes than the rates to Omaha, Louisville, Dunbar, etc. At the present time the tariff ranges from 5 cents to 3 cents higher at Lincoln than the existing rates to Omaha and other Missouri river points.

Before the act to regulate commerce took effect the difference in the printed tariffs from Chicago to Omaha and Lincoln was from 14 cents to 5 cents per hundred on the various classes, and the rates to both places were higher than at present. Rebates were freely given, however, and the Lincoln merchants were led to understand that by that means they were securing about the same rates charged Omaha merchants. But rebates were allowed to a considerable extent at Omaha also, and the disparity shown by the printed tariffs was in fact in that way substantially preserved.

It is not claimed that these rates are in themselves unreasonably high; but the complainants still insist, that the existing rates unjustly discriminate against Lincoln in favor of Omaha.

Considerable assistance in money and land grants was given to the Burlington & Missouri River R. Co., in Nebraska, in connection with the original construction of its lines, by the city of Lincoln and by the State of Nebraska; but it is not perceived in what way the facts in respect thereto are here material.

Municipal
subscriptions
and land
grants imma-
terial.

Lincoln is by law entitled to rates which shall not give an undue preference to any other locality, and its right in that regard is not increased, nor is the equal right of Omaha diminished by municipal subscriptions which were advanced for the building of the road.

The views of the commission have heretofore been sufficiently expressed upon the alleged practice by which large business centres are made rate-basing points.

Coming, then, to the single remaining question of the relative rates, it appears that the existing class rates to Lincoln are from $6\frac{1}{2}$ to 19 per cent higher than to Omaha, the average being something more than 9 per cent. The factor of distance, therefore, upon which the complainants rely, does not point to any serious discrimination in the rate. It is true that upon the line of the defendant system the distance from Chicago to Lincoln is but 1.06 per cent of the distance from Chicago to Omaha; nevertheless it cannot be overlooked that this is caused by the fact that Omaha is one side of the main line of defendant's road, while by the more direct line to Omaha the distance to that point is relatively less, as above stated. Taking the shortest route to each point as the basis, the disparity in rates corresponds quite closely with the difference in distance.

Difference in
distance—Dis-
parity of rates
—Shortest
route.

Complainants, however, appeal to a principle, said to be acknowledged in making freight rates,—that with the increase of distance the ratio of the rates shall decrease. This principle is generally acknowledged when the rates are based upon distance and cost alone, and are not affected by other modifying conditions; and its justice arises from the obvious fact that the expense of transportation does not increase in proportion to the distance, many of the elements which unite to make up the cost of handling freight being the same whether the terminal points be more or less widely separated; it is easily perceived, however, that other considerations may often affect the application of the rule. *Business Men's Association of Minnesota v. Chicago, St. Paul, Minneapolis &*

Omaha R. 2 I. C. C. R., 52; s. c., *infra*. In the present case, for example, the Omaha rate is confessedly not based alone upon the mileage of the defendant road to that city, but, as several lines from Chicago concentrate at Omaha, the mileage of the shortest route is the one which naturally and practically governs in the determination of the rate. Moreover, the different routes which are traversed by the various lines competing for traffic from Chicago to Omaha, with their various points of intersection, cannot be overlooked. It appears that the Omaha rate is also the Missouri river rate, precisely the same charged at a large number of points above and below that city, which are reached by one or another of the various roads which compete for Missouri river traffic. It is not claimed that this fact involves any impropriety or any violation of law. On the contrary, its justice appears to be conceded; and the result is to a large extent brought about by obedience to law. Prior to the passage of the act to regulate commerce, points in Nebraska on the line of the Missouri Pacific, like Louisville, Dunbar, Weeping Water, and Falls City, were charged higher rates than were given to Omaha, at a greater distance over the same line. Many points in western Iowa were treated in a similar way. Now, the rate to all such points is made no greater than the rate to Omaha. Lincoln was also formerly favored in the same manner as Omaha. The result of the operation of the law, among other things, has been that points near the Missouri river in Nebraska, and points in Iowa along the lines running east from the Missouri river, receive through rates which are much less than any they have formerly known. The Omaha rate, in fact, comes in use upon the defendant's line at a point 90 miles east of Omaha, and the mileage comparison might as well be made at the eastern end of the group as the western. If so made, the Lincoln rate would obviously be greatly below the increase due to the increase of the distance.

Moreover, it is shown that the rates from Omaha and from Lincoln to interior Nebraska points are so arranged that the rates from Chicago are practically the same whether the freight is handled by jobbers at Omaha or at Lincoln, so that the latter, in fact, suffer no prejudice in the actual conduct of their business as compared with their Omaha competitors.

As has been previously said by the commission, the extent of traffic carried and the character of the country traversed are necessarily to be considered in applying the rule appealed to. The ratio of rates charged through the sparsely settled regions of the distant West cannot decrease in proportion to distance without depriving the carriers of necessary revenue.

And while such a condition may not exist in the fertile regions about Lincoln, nevertheless the interests of that locality are chiefly agricultural; there are no ores, no lumber, no stone, no coal to increase the revenues of the carriers; the business of the roads is almost wholly confined to supplying the necessities of a farming population and the distribution of farm products; although the traffic so afforded is considerable, and, when concentrated at eastern terminals, is immense, nevertheless the possibilities of tariff reduction afforded by roads which are largely fed by mineral resources, quarries and manufactures, cannot be fairly expected at the present time upon the numerous lines which interlace themselves throughout the purely agricultural State of Nebraska.

The application of the principle in question is also frequently affected by the fact that the rate for the shorter distance is of itself a low one—often too low to be treated as a fair criterion for points beyond. It sometimes happens that a road having a long mileage to a given point is there met by a much shorter line which makes a rate just and reasonable on its part, but not fairly remunerative if the distance of the longer line is alone to be considered. In such a case the longer line, conforming to the law, must give a rate no greater than that fixed by its competitor to the given point and also to intermediate points on its line; but when the given point is passed, it may fairly increase its charges, with some consideration of the absolute distance by its own line from the originating point, and in a ratio more rapid than the proportionate charges would have otherwise shown, had it been able to grade its own rates continuously throughout its line. The same effect is at times produced by water competition and other controlling causes. Omaha is situated upon a large navigable stream, and, although the Missouri river does not at present afford active competition with the carriers by rail, nevertheless its existence and its possibilities are potential in maintaining low rates along its banks.

These various considerations are necessary factors of the situation; and in view of them it is clear that the complaint of the Lincoln Board of Trade against the existing rates to that city is not well founded. In fact, it does not seem probable that this complaint would have been presented had the rates, when it was filed, been the same as they were afterwards made. The disparity between the rates to Omaha and those to Lincoln is now slight. It is no more than the distance appears to fairly call for, especially when considered in connection with the other conditions which surround the case. The hope apparently entertained by the petitioners, that some basis could be found whereby the same rates might be given

to Lincoln as to Omaha, has not been supported by the proofs; in fact, as the matter now appears, no such arrangement could be made without affording to the citizens of Omaha a substantial grievance. The commission has already decided that the existing system of through rates to interior Nebraska points is not an undue prejudice against Omaha under the act to regulate commerce. *Martin v. Chicago, Burlington & Quincy R. Co. et al.*, 2 I. C. C. R., 25; s. c., 33 Am. & Eng. R. R. Cas. 649. The rights of that city are entitled to full consideration, however; and, having viewed the subject with care from the standpoint of each party, the commission finds that the rates now established by the carriers apparently work out substantial justice to both.

The petition is therefore dismissed.

Freight Rates—Distance—Competitive Lines.—In the case of the Lincoln Board of Trade *v.* Missouri Pacific R. Co., decided at Lincoln, Nebraska, August 11, 1888, the same complainants, as in the principal case, presented a petition alleging violation of the act to regulate commerce in the rates established by the Missouri Pacific R. Co. from St. Louis, Missouri, to Lincoln, Nebraska. The complaint alleged that the rates were from 10 to 50 per cent. higher than the rates from St. Louis to Omaha, and worked an undue preference against Lincoln in favor of Omaha. The commission found that in point of fact the same difference existed between the rates from St. Louis to Lincoln and Omaha as were considered in the principal case in respect to the rates from Chicago to the said cities. It appeared that the distance from St. Louis to Omaha by the defendant's line is 494 miles, and to Lincoln 490 miles. The line of the Wabash, St. Louis & Pacific R. Co. from St. Louis to Omaha is 413 miles in length. The evidence showed that the rates to Omaha made by the Missouri Pacific R. Co. were controlled by the rates of the Wabash, St. Louis & Pacific R. Co., and were made for the purpose of meeting the rates upon the latter line. The Missouri Pacific R. Co., in answer to the complaint of the Lincoln Board of Trade, pleaded that the same exceptional circumstances did not exist, and that therefore it was justified in charging a higher rate to Lincoln than to Omaha. The commission sustained this contention, and held that, taking all the circumstances into consideration, the rates charged were not unreasonable. In disposing of the question, Commissioner Walker says:

"But the question is not yet answered, whether, having met the Wabash rate at Omaha, the defendant should not give Lincoln the same terms. Complainant insists that it should, because the distance is a trifle less, and because Lincoln, as the centre of a thriving trade, is entitled to protection against all rivals. Defendant, on the contrary, points to the fact that the rate which it makes to Omaha is not a matter of favor, but of necessity. It insists that it gives Lincoln equal rates with Omaha upon all business coming from a direction where there is no competition by a shorter route. It shows that the discrimination in the St. Louis rate between traffic to Omaha and Lincoln has been reduced nearly one half since the filing of the petition. It avers that the existence of the difference which remains is not due to any wish on its part to unduly prejudice the city of Lincoln. It claims that the rate from St. Louis to Lincoln is not of itself unreasonable. It alleges that the general scheme on which

rates are made throughout the vast territory covered by the roads that have united in the existing tariffs, requires that the existing difference between Omaha and Lincoln should be preserved upon traffic from St. Louis as well as from Chicago; and it insists that the fact, that a low rate from St. Louis is forced upon it by competition at Omaha, should not be taken advantage of to compel a corresponding reduction upon its Lincoln branch.

"This legal question is therefore presented: Is the preference in question undue and unreasonable?"

"Under all the circumstances, we are inclined to the opinion that it is not. In reaching this conclusion, we are influenced to some extent by considering what consequences might result from a contrary decision. It is clear that questions of this kind must be determined upon broader principles than mere comparisons of mileage. If the rule contended for by complainants is enforced, Kansas City, Leavenworth, and Atchison might allege that their distance from St. Louis is very much less than that of Lincoln, nevertheless they are charged the same rates, to their prejudice, in competing for the trade of northern Kansas and southern Nebraska. It would be difficult for Lincoln to resist such a claim, except by taking the position that the general good of the territory west of the Missouri is best subserved by the maintenance of rates upon the present plan,—that is, by giving identical rates from Chicago to all Missouri river points, and to such points west of the river as the exigencies of the fourth section of the Act to Regulate Commerce require, and increasing gradually from that line to the west. Lincoln is situated some 30 or 40 miles west of the line so drawn. This line was not the creation of the defendant, nor was it established for any wilful purpose to wrong complainants' thriving city. It exists by reason of the application of the provisions of a new law to previously establish facts. A disregard of its presence and importance might produce many complications, some of which, as above suggested, would be greatly injurious to Lincoln. The withdrawal of defendant from its present competition with the shorter line at Omaha, would at once permit an increase of the rates at a large number of points in eastern Nebraska and Kansas, causing much disaster and hardship. To order a reduction in the St. Louis rate at Lincoln, would naturally involve the rates at many points south and west of Lincoln, not only upon the defendant line, but upon other roads as well.

"Moreover, it is difficult to see from the proofs that any substantial damage is effected by the difference in rates complained of. It is in evidence that the distributing rates from Lincoln are so arranged in comparison with those from Omaha, that the difference in the rates to these points is equalized. To this, complainants reply that this is not done by the defendant road, but by another. That is also true; but nearly all points available to Lincoln jobbers are reached by lines over which the adjustment is made. The fact therefore exists, and is an answer to the claim that the Lincoln merchants are damaged, in comparison with Omaha merchants, by the disparity in rates complained of. The same disparity exists as to merchandise which is consumed in Lincoln; but for this the situation of that city a substantial distance west of the line of common rates from eastern points must be held responsible.

"So long as the present system of making rates to Nebraska is maintained, the geographical position of Lincoln appears to warrant the difference made between the rates from Chicago and St. Louis to Lincoln and to Omaha. While it is not impossible that some better system may hereafter be devised, none has as yet been suggested."

NEW FRUIT EXCHANGE

v.

THE CENTRAL RAILROAD CO. OF NEW JERSEY *et al.*

(*Interstate Commerce Commission, July 23, 1888.*)

Interstate Commerce—Fruit—Unjust Discriminations—Jurisdiction of Commission.—In an application to the Interstate Commerce Commission, which alleges unjust rates for the transportation of peaches, it appeared that the peaches were shipped from points in New Jersey and addressed to persons in New York, but that instead of being delivered in New York for the convenience of the consignee, the peaches were delivered in Jersey City. *Held*, that the facts did not support an allegation that the railroad company transporting the peaches charged a rate which discriminated unjustly against points in New Jersey, and in favor of New York; and that no point affecting inter-state commerce was presented of which the commission could take cognizance under the act to regulate commerce.

COMPLAINTS by the New Jersey Fruit Exchange against the Central R. Co. of New Jersey and the Lehigh Valley R. Co., alleging unjust rates for the transportation of peaches.

J. A. Bullock for complainant.

Robert W. de Forest for defendant the Central R. Co. of New Jersey.

F. H. Janvier and *F. I. Gowan* for defendant the Lehigh Valley R. Co.

SCHOONMAKER, C.—The complainant in this case is duly incorporated, under the laws of New Jersey, under the name and style of the New Jersey Fruit Exchange, and the complaint sets forth that the defendants, the Central R. Co. of New Jersey and the Lehigh Valley R. Co., charge eleven cents per basket of sixteen quarts for the transportation of peaches from Flemington and neighboring stations to New York, eight cents from Bloomsbury to Easton, and similar rates from and to other places; that the average weight of a basket of peaches is thirty pounds, and the distance from Flemington to New York is fifty-two miles, making the freight charge fourteen cents per ton per mile between those places; that the distance from Bloomsbury to Easton is eight miles, and the rate is forty-four cents per ton per mile; that the peaches from that section are generally transported in full carloads, several being filled at each

Facts—pleadings.

station every day during the season of gathering the fruit. The complaint charges that the rates are excessive, unreasonable, and unjust, and in violation of the first section of the act to regulate commerce; and the petition asks that the commission shall order such reduction of rates by the companies complained of as shall make them reasonable and just and in accordance with the provisions of the interstate commerce act. Schedules of rates are annexed to the complaint, and are made part of it.

The answers admit that the charges for transportation of peaches during the peach season of 1887 were as stated in the schedules annexed to the complaint, but deny that any rate is made from points in New Jersey to the city of New York. The weight of a basket of peaches and the distance from Flemington to New York, and from Bloomsbury to Easton, are also admitted.

It is further admitted that peaches from many, although not from all the stations in the section referred to, are generally transported in full carloads, and the answers deny that the rates for the transportation of peaches are excessive, unreasonable, or unjust; and justify the rates by setting forth that the transportation of peaches requires special preparation and special arrangements, which greatly increase the cost of transportation. The answers specify the number of cars set apart for this special service, and the manner in which they are fitted up for that purpose; and also allege that after the season opens, special trains are run for the transportation of peaches, one, and frequently two daily, making almost the time of passenger trains, and that a large force of men is employed at the peach-shipping stations and at Jersey City in this service, at considerable expense; that the peach trains deliver their freight at a special yard in Jersey City, and not in New York City, said delivery at Jersey City being more expeditious and more convenient for shippers; that the peach cars can carry no return freight by reason of the manner in which they are fitted up, and are returned empty, except that the baskets are returned by them, and on these no charge is made. It is further alleged that the rates heretofore charged have only been remunerative in years when a full crop of peaches was raised and transported; that when crops have been small, said rates have barely covered respondent's expenses. The answers set forth that, so far as the transportation is concerned, the commerce is entirely within the limits of one State, to wit, the State of New Jersey.

The essential facts as to the distance hauled, the rates charged, the weight of a basket of peaches, that they are usually transported in carload lots, that the service is special,

and cars fitted up expressly for the business, and that the time made is nearly equal to that of passenger transportation, are all disputed, and are set forth in the pleadings.

Considerable testimony was given on the hearing, showing the origin and growth of the peach traffic, the quantities transported for several successive years, and the prices received for the peaches in the market. Evidence as to shipment of peaches. Evidence was also given showing in detail the manner in which the cars are fitted up for the service, and the expense of fitting them up, and the additional expense incurred by the defendants for the train service in the transportation of the peaches. It was satisfactorily shown that the transportation of the peaches in question by defendants, so far as that transportation is east-bound, is to Jersey City, and not to New York, and that the delivery of the peaches to the consignees in New York—or when they are carried by other lines beyond New York—is at Jersey City. The tariffs published by the defendants for this transportation are to Jersey City, and not to the city of New York, and other tariffs were put in evidence showing that the transportation to the city of New York by the defendants is three cents per hundred higher than to Jersey City. It appears in evidence that the present rates of transportation for peaches are the same as they have been from the beginning of the special service for this traffic, and that, although the volume of business has largely increased, the rates have not been reduced. It also appears in evidence that the shippers of peaches are at liberty to have them transported in ordinary freight trains to New York, at a rate of transportation which, on those trains, is lower than on the special trains, but that it is highly important that the peaches should have a speedy delivery in the market, and for that reason the shippers prefer the special trains. It also appears that the delivery in Jersey City has been the custom for many years, and is not a device of the carriers to evade the law, but is made there by the consent and for the accommodation of the consignees in New York. During the last season, and since the organization of the Fruit Exchange, the sales of peaches by the growers have, to a considerable extent, been made in New Jersey at or near the points of production, instead of being transported, as formerly, to New York to be sold by commission agents; and the growers have realized better prices since their sales have been made in New Jersey. Very little testimony was given in relation to the west-bound shipments into Pennsylvania and other western points, and no data have been furnished to the Commission upon which any satisfactory conclusions can be based as to the rates upon shipments

in that direction. The bulk of the shipments, as shown by the testimony, go to the city of New York.

Upon the facts of the case, as they appear without contradiction, the Commission has no authority or jurisdiction to make an order concerning the rates. If the shipments were interstate in their character, they would be within the jurisdiction of the Commission; but as the transportation by the carriers is wholly within the State of New Jersey, the Commission has no jurisdiction. The proviso in the first section of the act to regulate commerce is as follows:

Commission has no jurisdiction to make an order concerning rates.

“Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.”

This provision applies to all the peaches that are delivered at Jersey City and destined either for New York City, or any points beyond that city.

The argument of the complainant's counsel, that a contract for delivery in New York is to be inferred from the fact that a tag is attached to one or two of the baskets in each shipment, addressed to the commission merchant to whom the shipment is consigned, showing the street and number of his place of business in New York City, is not supported by the proofs. The undisputed facts are, that the delivery is actually made in Jersey City; that the returns of the commission merchant invariably show the deduction of a given sum for freight and four cents for cartage; and that the consignees desire to receive, and in fact actually do receive, the peaches at Jersey City. Whatever *prima facie* contract may in some cases be inferred from the receipt of an addressed parcel, it is clear that in the present case no duty is undertaken by the carriers, and none devolves upon them, beyond the delivery of the peaches at Jersey City.

These facts being clear, it is superfluous and profitless to dwell with any detail upon the character of the business, or to discuss the subject of the rates. It may be appropriate to observe, however, that, in view of the increasing volume of business in the peach traffic, and the increased competition in the New York market, a reasonable reduction in the rates, corresponding with the growing volume of business and the competition in the market, might be just. It would seem quite probable that rates which might have been deemed reasonable and necessary in the infancy of this traffic, now that the traffic has become large and important, might justly

be reduced to some extent, and still leave to the carriers full compensation for the service and a reasonable margin of profits. These are considerations that address themselves to the sense of justice of the carriers, and rest on the principle of fair dealing that is due between the carriers and their customers.

For the reason that there are not sufficient facts presented in the case upon which to base an order respecting the west-bound shipments, and that the transportation to Jersey City is wholly within the State of New Jersey, and therefore not under the jurisdiction of this Commission, the complaint is dismissed.

HURLBURT

v.

LAKE SHORE AND MICHIGAN SOUTHERN R. CO.

(*Interstate Commerce Commission, July 20, 1888*).

Interstate Commerce—Proceedings to Adjust Tariff—Parties.—When a manufacturer presents a complaint to the Interstate Commerce Commission, which alleges that goods shipped by him over a railroad, to points upon other lines, are charged according to the tariff applicable to a higher class of goods than that to which they belong, it is sufficient if he make only the railroad, with which he contracts for the shipment, a party to the proceedings, the connecting lines not being necessary parties for the determination of the question presented.

Same—Discrimination—Agreement with Carrier.—An assurance made to a manufacturer, upon his locating at a certain point, that a railroad company would carry his goods as belonging to a certain class, can not have any force in determining to which class such goods belonged.

Same—Classification—Evidence.—A member of the railroad committee which prepared the official classification, can not competently testify as to the understanding of the committee when they prepared the classification.

Same—Opinion Evidence—Expert.—When goods have been inserted in the tariff by a name which is presumed to be known to the trade, the testimony of persons connected with transportation is not admissible for the purpose of explaining the terms used in the tariff sheet, persons trading in and manufacturing such goods being the only witnesses whose opinion can competently be received.

Same—Hub-blocks—Classification.—Blocks of wood intended to be turned into hubs of wheels, but which have only the bark turned off and the centre taken out for the purpose of preventing unequal contraction, and the end dipped in a mixture of rosin for the purpose of preventing checking at the ends, but which usually are kept for one or two years for seasoning, and are steamed before being made into hubs, are to be classed as "lumber," and not as "wagon material, unfinished."

COMPLAINT by Frank L. Hurlburt against the Lake Shore & Michigan Southern R. Co., alleging the improper classification of rough hub-blocks, and excessive rates. The opinion states the facts and the point in issue.

COOLEY, Chairman—The complaint in this case presents a question of construction arising under what is known as official classification No. 2, adopted by the joint committee of the Trunk Line Association, to take effect July 15, 1887. Question presented.

The complainant is a manufacturer of hub-blocks at Ashtabula, Ohio, on the line of the defendant's road. Previous to 1887 he was in the same business at another place and on the line of another road, and, in view of a removal to Ashtabula if satisfied it would be to his advantage, he opened correspondence with the general freight office of the defendant to ascertain what the freight charges would be on his product. In the correspondence the terms "hub-blocks" and "hub-blocks in the rough" were made use of. In response to his inquiries, the regular rates on articles in the sixth class were quoted to him. After receiving the response, he located at Ashtabula, relying, as he claims, upon having sixth-class rates regularly given him. Facts.

The blocks which complainant prepares for market, and in which he deals, are variant in size, but appear from the evidence to average about twelve inches in length, and to be in diameter from about four inches up to about twelve. They are sawed from trunks of trees, or logs, which, as a maximum, must not much exceed a diameter of twelve inches, and they are then passed through the turning machine and sufficient taken off to remove all the bark, leaving a cylindrical block of uniform thickness. A hole an inch or so in diameter is then bored longitudinally through the heart of this block, and the ends are dipped in a preparation of rosin and oil to prevent checking. In that condition the blocks will average in value about four cents; and it is in that state that complainant disposes of his blocks to the manufacturers of hubs and wheeled vehicles. Complainant has made several shipments over defendant's road, but in each case the consignment has been billed as fifth-class merchandise. The freight department of defendant insisting that the billing is such as the classification requires, this proceeding is instituted to correct the supposed error.

A preliminary objection is raised on the part of the defence that necessary parties are wanting.

The consignments made by complainant over defendant's road were destined respectively to Wallingford, Connecticut;

Lambertville, New Jersey; New Haven, Connecticut, and Shortsville, New York. In each case the consignment was billed for delivery by defendant to another carrier, the defendant's road not reaching any of the points named. None of the other carriers is made a party to this proceeding. Counsel for defendant insist that this is essential, and that consequently this proceeding should be dismissed. We do not think so.

In *Allen v. Louisville, New Albany & Chicago R. Co.*, 1 I. C. C. Rep. 199; s. c., 31 Am. & Eng. R. R. Cas. 630, it was decided that when the object of a complaint was to compel a reduction of rates from a western point to the seaboard, all the carriers forming the line over which the property is transported must be parties, and that it is not sufficient to proceed against the initial carrier alone. The reason is obvious: all the carriers are interested alike and directly, and any order made against the initial carrier alone would be altogether futile, since the direction to that carrier to change the rate for the whole distance would be one it would have no power to comply with, because it could not, even under the order of the Commission, make rates for other carriers. But an order to this defendant, that it receive merchandise and bill it in a particular class for transportation, would be one that there would be no difficulty in its complying with without awaiting the consent of others.

Connecting
carriers not
necessary parties.

It is true that, the other carriers which have received complainant's property from the defendant are interested in the question the case presents; but so are all the parties which united in making official classification No. 2, and which are governing their rates by it. If in this case it should be held that the classification actually made by the defendant was erroneous, all the carriers making rates under official classification No. 2 will be expected to conform to the ruling. The interest is so apparent that, if any of such carriers had appeared and asked to be heard when this case was presented, the request would have been granted without hesitation. Nevertheless, the interest of such other carriers is indirect, and is in the question involved, rather than in the particular controversy; it is such an interest as in judicial proceedings would not make any one of them a necessary party to a suit. And to require all the parties governed by the official classification to be joined in this case would, from the very number, be to make the remedy of little or no value. But the law clearly, as we think, does not require it.

If the Commission were to undertake to make an order retrotractive in terms, and to require the refunding of freight

moneys paid, which have been received by several parties, the necessity for such parties being first brought in might be imperative; but in this case, if we find the classification erroneous, we shall restrict to its correction any order that may be made. The defendant is not therefore entitled to have the case dismissed.

It will be convenient, before taking up the official classification for examination, to consider the complainant's claim, that he was induced to locate at Ashtabula by the assurances of defendant's agents that his goods would be taken as sixth-class. Some importance is attached to these assurances as establishing equities in his favor. On the other hand, it is contended by the defence, that complainant was understood in the correspondence to be asking for rates upon blocks as they are when first cut from the log, and with the bark on, and that it was with reference to such blocks that rates were given him. We do not, however, consider this very material. The official classification must have the same construction in favor of all other persons as is given it in favor of complainant; no assurances to him, however honestly made or honestly relied upon, can entitle him to special rates. He could not have special rates under an express promise, and, quite as plainly, he cannot have them because of any conduct of defendant's agents such as was shown in proof. The law requires uniformity and impartiality in the dealings of a carrier with all its customers.

Inducements
to locate on
line—Assur-
ances as to
classification.

We are brought, then, to an examination of official classification No. 2. This classification has since been superseded, but the clauses in it which would bear upon this controversy are retained in that which takes its place.

Examination
of official clas-
sification.

Among the articles specified is lumber, which, in carload lots, is placed in the sixth class. Under the general head of wood articles is specified "wooden billets, sawed in rough," also placed in the sixth class. Under the general head "parts of vehicles and vehicle stock or stuff in carloads," are mentioned hubs, placed in the fifth class, and wagon material, unfinished, also placed in the fifth class. The hub-blocks dealt in by complainant must find a place with some of the articles thus mentioned.

On the hearing, it was thought by counsel that a settlement of the proper term to be applied to these blocks might go far to determine their place in classification, and the defence sought to show that the proper designation was hub-blocks, as distinguished from hub-blocks in the rough, which, it was contended, were the blocks before the bark was removed. A member of the

Testimony of
member of
committee.

committee of railroad officers who had prepared official classification No. 2, was called and asked to give his opinion and the understanding of the committee, but the evidence was ruled out as altogether inadmissible. A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for transportation. The committee who prepared the classification have no more authority in construction than anybody else, and they must leave the document, after they have given it to the public, to speak for itself.

Terms of art, however, or terms peculiar to a particular occupation or business, may sometimes require the evidence of experts for their full understanding; and the defence offered testimony of persons connected with transportation as to the understanding of the terms "hub-blocks" and "hub-blocks in the rough" in transportation circles; but this evidence was also rejected for the plain reason, that it was not the meaning as understood in transportation circles that was in question, but the meaning accepted and acted upon in the business in which the blocks are dealt in and made use of. The classification is supposed to inform the persons engaged in that business, in what classes the articles they handle are placed for transportation purposes; and it would fail to do this if, instead of employing terms of designation in the sense familiar to themselves, it made use of them in a sense fixed upon by persons engaged in an occupation altogether different, and which might to an expert in their own business be strange and misleading.

But we do not regard the term applied to the particular article in question as very important when neither of the terms suggested is found to be given in the classification sheet. We have the article before us in the proof, and the question is, where it should be placed under a classification which does not name it specifically. The defence claim, that it belongs with "wagon material, unfinished," it being indisputably designed for wagons, and a process of manufacture having actually been commenced upon it. This fact—that the manufacture has been commenced—is supposed by the defence to be what should determine the question in controversy.

It is conceded, however, that there is a stage in which wood is not to be classed as "wagon material, unfinished," though destined for the making of wagons, and though something has already been done upon it in the way of prepara-

Opinion Evi-
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Proper classi-
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blocks.

tion. Thus, wood for wagon boxes is in a process of manufacture when it is being cut into boards; but it is not then called "wagon material, unfinished." Indeed, if the boards were to be cut at just the required length and sold for the particular use, they would still be "lumber," and would be accepted and transported as such, in the sixth class. This was conceded by counsel on the hearing. The process of manufacture, then, is a process subsequent to that which converts the trees into lumber; and it may be added, that it is commonly a process which begins some considerable time later, and after the lumber has become seasoned.

Now, the evidence in the present case is, that the manufacturers of hub-blocks procure the raw material in the log, cut it into pieces of the proper length, turn off the outside sufficiently to remove all bark, which in part is done to guard against injury by worms, and take out the heart. All this is for the purposes of a proper and safe seasoning. If the seasoning were to take place with the bark on and the centre not taken out, the cracking from unequal contraction would render the blocks unsuitable for use. The dipping of the ends in the mixture of rosin and oil is to prevent checking at the ends. When thus prepared, the blocks should be and usually are kept for one or two years for seasoning, or should be steamed, before they can be made into hubs; but all that is done up to this point is not the beginning of a manufacture of hubs, but it is a preparation of timber from which in due time hubs may be manufactured. The marketable value of hub-blocks only begins when the blocks are in the condition described; until that stage is reached, the raw material would, under the classification in question, be classed as "logs." The process of preparing the blocks corresponds very closely to the process of converting trees into boards for such uses as boards are applied to; the manufacture of the particular article begins after the seasoning of the raw material is completed.

There are reasons of strong equity why the railroad managers, in making classification sheets, should thus distinguish between the material which is thus being prepared for manufacture and the article while the manufacture is in progress. It was shown in this case, that the value of a carload of these blocks, weighing 28,000 pounds, would be but about \$280, while the value of a like load of the hubs in the rough—that is to say, of the blocks turned down to the size and shape of hubs, but not mortised or otherwise perfected—would be about \$5000. The reasons, therefore, would be very strong for not classing the blocks and the hubs in the rough together, and it is not likely that any classification committee would

intentionally do so. But, however that may be, we do not think it has been done in this case. The blocks in question are not to be regarded as "wagon material, unfinished," because the process of making the marketable article into parts of wagons is not yet begun upon the marketable article. They are the unseasoned raw material on its way to the hands of the manufacturer. They must therefore be considered as properly classed with lumber, and not as they were classed by the defendant's agents in the case of the consignments in question.

This construction of the classification is strongly supported by the lumber tariff issued by defendant, and in force upon its lines. In the official classification the word "lumber" is not defined, nor is any attempt made to indicate what articles are intended to be embraced in that general designation. The lumber tariff, however, enumerates a line of articles which are accepted for transportation under that general head. They include, among others, barrel shooks, box stuff, cooperage stock, heading bolts, hoops, hop poles, lath, wooden paving blocks, pickets, picture backing, shingles, stave bolts, staves, and heading, telegraph cross-arms, and telegraph poles. Applying to hub-blocks the rule of the classification, that "articles not enumerated will be classed with analogous articles," they quite easily arrange themselves with the articles above named, some of which, indeed, have reached the final stage of manufacture. On the other hand, the articles-manufactured from wood which are placed by the official classification in the fifth class were enumerated in the case of *Reynolds v. Western New York & Pennsylvania R. Co.*, 1 I. C. C. Rep. 397; s. c., note, 32 Am. & Eng. R. R. Cas. 595; and scarcely any of them can be said to be analogous to the hub-blocks in question.

Order will be entered, that the complaint is sustained, and that in any consignments to be hereafter made over its road the defendant must conform to the construction of the classification sheet above laid down.

Improper Classifications.—See *Pyle v. East Tenn., etc., R. Co.*, 32 Am. & Eng. R. R. Cas. 584, note 595.

Opinion Evidence.—As to opinion evidence, or the admissibility in evidence of the opinions of persons who are not of that class known as "experts," see *tit.* "Expert and Opinion Evidence," 7 Am. & Eng. Encycl. of L.

BRADY *et al**v.***PENNSYLVANIA R. CO. *et al.****(Interstate Commerce Commission, July 23, 1888.)*

Interstate Commerce—Freight Rates—Connecting Lines.—If railroad companies, by agreement, form their tracks into a through line and offer it to the public for continuous carriage, they cannot escape responsibility for unreasonable charges by claiming the haul is devisible according to the length of each line, but must contract for through business according to a reasonable freight rate applicable to the whole distance.

Same—Controlling Interest in Connecting Line.—The Pennsylvania R. Co. own a controlling interest in the stock of the Pittsburgh, Cincinnati and St. Louis R. Co., although the latter company operates its own line. The main line of the Pennsylvania R. Co. connected with the line of the Pittsburgh Co., and through traffic was carried over both lines under through contracts. *Held*, that the Pennsylvania R. Co. could not make freight rates from points upon the line of the Pittsburgh, Cincinnati & St. Louis R. Co. which operated as an unjust discrimination in favor of points upon its own lines or upon other lines controlled by it in a similar manner.

Same—Danger of Transportation—Carriage of Oil.—If oil is carried through a city in such quantities that the charges to meet any liability of the company arising out of the danger from necessary transportation through the city is so slight when apportioned upon all the business, that it could not sensibly effect the rates which should be charged, the Interstate Commerce Commission will not consider such danger in deciding upon the reasonableness of the rates charged for the carriage of oil.

COMPLAINTS by John W. S. Brady and George T. Parkhurst, partners trading under the firm name of J. Parkhurst & Co., and John Henry Nicolai, Trading as "Eagle Oil Works" against the Pennsylvania R. Co., the Pennsylvania Co., and the Pittsburgh, Cincinnati, & St. Louis R. Co., alleging that the freight asked by the defendant on the carriage of crude petroleum from Washington, Pennsylvania, to Baltimore, Maryland, in car-load lots is unjust and unreasonable. The case is stated in the opinion.

John Henry Keene, Jr., and Archibald Sterling for complainants.

James A. Logan and Bernard Carter for Pennsylvania R. Co.

John Scott for Pittsburgh, Cincinnati and St. Louis R. Co.

MORRISON.—These cases were heard together by consent of the parties. In their facts, reasons, and the answers of the defendants they are substantially the same. In both complaints is made of the defendants that from April 15, 1887, they exacted and demanded and continued to charge the plaintiffs fifty cents per barrel of forty-five gallons each of crude petroleum from Washington, Pennsylvania, to Baltimore, Maryland, in carload lots; that, while exacting fifty cents between the places named, the defendants carry such oil to Baltimore for forty cents, from Bradford and Clarendon, Pennsylvania, and Olean, New York, about the same distance as Washington, Pennsylvania, from Baltimore; that the said charge of fifty cents is unjust and unreasonable, and to the extent of ten cents per barrel excessive, and that complainants have paid, under protest, to defendants, large sums for such unjust, unreasonable, and excessive charges, for which complainants ask reparation.

The Pennsylvania R. Co., answering separately, denies that it was a through carrier of oil from Washington to Baltimore, and avers that it was only a carrier from Pittsburgh to Baltimore, for which it received thirty-five cents per barrel; that the oil was carried from Washington to Pittsburgh over the lines of other companies for fifteen cents, and that the gross charge of fifty cents from Washington to Baltimore is just and reasonable, considered by itself, or as compared with the rates from Bradford, Olean, and Clarendon, because of the greater hazard in passing manufacturing plants and other buildings in Pittsburgh.

The Pittsburgh, Cincinnati and St. Louis R. Co. "denies that at a period named in the bill of complaint it was engaged in the transportation of passengers and property from the State of Pennsylvania to the State of Maryland," and avers that it charged a uniform rate of fifteen cents per barrel for all oil carried from Washington to Pittsburgh, which, it avers, is a reasonable and just rate.

The Pennsylvania Co. denies that it was engaged or interested in the transportation of oil between any of the places and during the period mentioned in the complaint, and denies the averments of the complaint, so far as they relate to this defendant.

The facts are found to be that—

1. The complainants, Parkhurst & Co., are dealers in crude and refined oil, and the complainant, Nicolai, is a refiner of oil at Baltimore, Maryland. The defendants are common carriers of passengers and freight over the lines of road owned or operated by them, which are, severally, lines of the "Pennsylvania system."

The lines of this system east of Pittsburgh are operated by the Pennsylvania R. Co.; those west of Pittsburgh by some one of the other defendants. The Pennsylvania R. Co. is owner of a majority of the capital stock and a controlling interest in the other defendant companies, each of which has a separate corporate organization.

2. The defendant companies have filed with the Commission the following :

“ AGREEMENT FOR A THROUGH LINE.

The Pennsylvania R. Co., the Pennsylvania Co., the Pittsburgh, Cincinnati and St. Louis R. Co., and the Chicago, St. Louis and Pittsburgh R. Co., common carriers, for the purpose of securing and promoting the continuous carriage of freight within the meaning of the Act to regulate commerce, commonly known as the Interstate Commerce Law, do hereby agree that they will interchange freight traffic to be transported over the routes hereinafter specified, and that in the interchange of such traffic the routes described shall be considered continuous lines, and that the through rates over such routes shall be made in accordance with the provisions of said Act which govern two or more carriers associated for the purpose of continuous carriage.

“ They further agree that all joint tariffs over the routes designated below shall be matters of agreement among said companies, and that when made they shall be filed with the Commission, as required by law.

“ It is further agreed that the lines or routes covered by this agreement are as follows:

“ Between all points on the roads of the companies named as parties to this agreement or on roads operated or controlled by any of them or on connecting roads with which any of the said parties may have or make auxiliary agreements for through lines, and between which points joint tariffs of through rates may be established by agreement of all the roads interested, it being understood that the filing with the Commission of such agreed joint tariffs shall be construed as establishing through lines between the points that may be named in such joint tariffs.

“ April 4, 1887.

“ THE PENNSYLVANIA R. CO.

“ By F. H. KINGSBURY,

“ Through Freight Agent.

“ WM. STEWART,

“ General Freight Agent Pennsylvania Co.,

“ P., C. & St. L. R. Co., C., St. L. & P. R. Co.”

3. The complainants, Parkhurst & Co., between April 15 and July 27, 1887, and complainant, Nicolai, between April 27 and September 1, 1887, purchased crude oil at Washington, Pa., and shipped the same—part from Washington, Pa., and part from Ewings Mills Station—to Baltimore. The oil was billed through from Washington and Ewings Mills Station to Baltimore by the defendant, the Pittsburgh, Cincinnati and St. Louis R. Co., and carried by it in the Green Line tank cars of the Pennsylvania R. Co. over the lines it (the P., C. and St. L. R. Co.) operates to Pittsburgh, 28 miles from Ewings Mills, and 32 miles from Washington, Pa. From Pittsburgh the oil was carried to Baltimore by the Pennsylvania R. Co. over its own line and the line of the Northern Central R. operated by it. The oil passed over none of the lines operated by the other defendant, the Pennsylvania Co.

4. The oil was billed at fifty cents per barrel of forty-five gallons. Freight was paid on it at that rate to the agent of the N. C. R. Co. at the place of destination, and all in excess of forty cents per barrel was paid under protest. The amount so paid under protest was by Parkhurst & Co., \$754.30; by Nicolai, \$1,108.90. The division of the fifty cents per barrel rate was 15 cents to the defendant, the P., C. and St. L. R. Co., for the haul to Pittsburgh, and 35 cents to the Pa. R. Co. for the haul from Pittsburgh to Baltimore.

5. The defendants frequently, without success, applied for a refund of the amounts of freight paid by them, respectively, in excess of forty cents per barrel, and at various times since, as well as before April 15, 1887, sought and failed to have the rate from the Washington, Pa., oil district reduced to forty cents. These applications and negotiations were to and with the Pennsylvania R. Co. In the correspondence on these subjects put in evidence is this refusal to refund:

Copy.

THE PENNSYLVANIA RAILROAD COMPANY,
OFFICE OF THE GEN'L FR'T TRAFFIC AGENT,
PHILADELPHIA, September 26, 1887.

J. H. NICOLAI, Esq., Eagle Oil Works, Baltimore, Md.

DEAR SIR: I am in receipt of your favor of 24th inst. covering claim for 10c. per barrel, rebate on oil shipped from Washington, Pa., and after thorough consideration, we are compelled to return the claim.

We do not think your ground well taken, and if our understanding of the Interstate Commerce Law is correct, we

have a perfect right to charge the present tariff from Washington, Pa.

Yours very truly,
(Signed), JOHN S. WILSON,
G. F. T. A.

And this in relation to the alleged excessive fifty cents rate :

THE PENNSYLVANIA RAILROAD COMPANY,
GENERAL FREIGHT DEPARTMENT,
PHILADELPHIA, July 3, 1886.

MESSRS. J. PARKHURST, JR. & CO.,
78 South Street, Baltimore, Md.

GENTLEMEN: I am in receipt of your valued favor of the 1st inst. relative to the rate on oil from Washington county to Baltimore, and regret that our agreements on oil rates are such that I am unable to make any concession in the tariff. It is the opinion of most of our oil shippers that the Washington county oil is of such superior quality as to enable it to pay the agreed tariff rates.

Yours very truly,
JOHN S. WILSON,
G. F. T. A.

6. From the time of the discovery or development of the Washington county oil field in 1885, the rate on oil to Baltimore has been fifty cents per barrel. During the same period the rate has been forty cents over the lines operated by the Pa. R. Co. from points about the same distance from Baltimore, viz., Warren, Clarendon, and Bradford, Pa., and Olean, New York. The distance to Baltimore from Washington is 363 miles; from Warren, 360; from Clarendon, 353; from Bradford, 333; and from Olean, 328. The oil from Olean and Bradford passes over the Western New York and Pa. R., and its proportions of the 40-cents rate is 7.27 cents for 51 miles' haul from Olean, and 8.17 cents for 74 miles (the most direct line is 56 miles) haul from Bradford.

7. The rate on the refined products of crude oil over the defendant's lines of road is 45 cents per barrel of 50 gallons for the same distances and between places for which the charge is 40 cents per barrel of 45 gallons of unrefined, or substantially the same price per gallon for crude and refined. The refined oil is worth \$7 or more per barrel; the crude less than \$1 per barrel.

8. Between Washington, Pa. and Pittsburgh, oil passes through tunnels, and through Pittsburgh is carried past and near to manufacturing plants and other buildings, and care

is required to prevent accidents from "ignition," as shown by the great damage incurred by one of the defendants as the result of a collision on its line at Brunswick, N. J. No accident has yet occurred to the defendants in carrying oil from Washington. The recent discovery of natural gas and its partial substitution for coal and oil in Pittsburgh, witnesses believed, tends to lessen, not to increase, the liability to accident in carrying oil through the city. The general cost of transportation on the Pennsylvania system of railroads is decreasing, or as one of its officers testified, is "getting down."

9. Previous to the year 1883 the rate on crude oil from the Olean and Bradford oil region to Baltimore was eighteen cents per barrel of 45 gallons. Some time in the year 1883 the rate was raised from eighteen to, and since then maintained at, forty cents. For several days next after the Act to regulate commerce was in force crude oil was billed and carried from Washington to Baltimore by the defendants for thirty-six cents per barrel, but it was so billed and carried in the confusion attending the adjustment of rates upon the going into effect of said act, and this was not a fixed or permanent rate.

The complaints in these cases were first made against the Pennsylvania R. Co. That company answered, denying that it was a through carrier from Washington, Pa., to Baltimore, and averred that it was a carrier only from Pittsburgh to Baltimore, and that the oil was carried from Washington to Pittsburgh by and over the lines of other companies. After hearing the cases so presented, leave was given the complainants to amend their petitions by making the Pennsylvania Company and the Pittsburgh, Cincinnati and St. Louis R. Co. parties defendants.

On the final hearing it is shown that the Pennsylvania Company was not engaged in the transportation of oil at the period and between the places named in the complaints, and that the carrying in question was done by other defendants, The Pa. R. Co. and the P. C. and St. L. R. Co.

The claims of the plaintiffs for reparation in money present cases in which the Commission makes no award, for reasons assigned in the case of *Wm. H. Council v. The Western and Atlantic R.; Co.* 1 Interstate Commerce Commission Report, 339, and the case of *Heck & Petree v. The East Tennessee, Virginia and Georgia R. Co., et al.*, same 495; s. c., 33 Am. Eng & R. R. Cas. 671.

The route over the lines of the defendants from Washington, Pa., to Baltimore, if not so without it, is made a through

and continuous line by their "agreement for a through line." Each of these two defendants operates a separate part of this continuous line, and denies that it is a carrier over more than it operates. The complaint is of excessive and unreasonable charges for freight billed through and carried over the whole of this continuous line. If this through carriage is broken into parts east and west of Pittsburgh, by operation of law or otherwise, such breaking might and probably would deprive the complainants of their remedy for the grievance complained of. That part of this through and continuous line west of Pittsburgh is wholly within the State of Pennsylvania, and when a separate or local line exclusively, not subject to the jurisdiction of this Commission. To this part the excessive charges complained of may be apportioned if the parties to the agreement for a through line may elect to constitute themselves carriers over distinct parts or sections of it.

Connecting lines—Separate corporations not free from liability.

The public has no interest in the division railroads make among themselves of their joint earnings from transportation over through lines. Nor have the complainants any interest in the division the defendants make between themselves of the through rate on oil. It is the reasonableness of the through rate, not of any division or part of it, that the complainants have a right to insist upon. It is true that part of the continuous line west of the city of Pittsburgh is operated by a separate corporation from the defendant, The Pennsylvania R. Co., which operates the part east. The same is true of all the lines of the Pennsylvania system west of that city. They are so operated for the convenience and profit of their owners. The Pennsylvania R. Co. owns a majority of the capital stock and a controlling interest in all the companies or separate corporations by which the several lines of the Pennsylvania system west of Pittsburgh are operated. The correspondence and attempted negotiation by complainants for lower rates over the lines through from Washington, Pa., to Baltimore, were all with the Pennsylvania R. Co.

Same—Controlling interest of Pennsylvania Co.

It conferred with complainants as to the reduction of such rates without any pretense of a want of authority to make and control them. The larger part, if not at all, the earnings of all the lines of the Pennsylvania system of roads operated by separate corporations, including the part of the Washington, Pa., and Baltimore line west of Pittsburgh, goes to the treasury of the Pennsylvania R. Co. This is equally true whether the earnings are derived from reasonable or unreasonable charges. With the right to appropriate the earnings

from rates and charges on lines it so largely owns, that it may control them, the Pennsylvania R. Co. cannot be permitted to free itself from the responsibility of excessive charges by getting behind separate corporations.

By their agreement filed with the Commission, the defendants made this a through line and offered it to the public for continuous transportation from Washington, Pa., to Baltimore. Through carriage implies a through rate which must be a reasonable rate. The defendants, The Pennsylvania R. Co. and the Pittsburgh, Cincinnati and St. Louis R. Co., by their agreement, made this a through line and offered it to the complainants and the public for continuous carriage over it. They billed and hauled the oil through over the line, and they cannot rid themselves from responsibility for unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of the line they hold out to the public as a through line..

In support of their claim that the defendant's crude oil rate of fifty cents per barrel from Washington to Baltimore is unjust and unreasonable, the complainants show that the rate over the lines of the Pennsylvania system for like distances from other oil-producing district is forty cents. In their demand for reparation they, the complainants, ask that they be awarded ten cents per barrel, the amount paid by them to defendants, under protest, in excess of forty cents, which is thus conceded to be a reasonable rate.

The defendants justify the fifty-cent rate as reasonable on the alleged hazard and liability to accident in carrying oil through Pittsburgh, and on this alone. They do not call to their aid any alleged difference in grades, volume of business, or other causes which affect the cost of transportation.

The correspondence between the plaintiffs and defendants, or one of the defendants, The Pennsylvania R. Co., put in evidence on the subject of this fifty-cent rate, has been extensive and goes back two years or more, but in it there is no mention of the alleged danger of passing through Pittsburgh as a justification for this high rate. Two years ago, as shown by the correspondence copied among the facts found, it was attempted to be justified in the superior quality (greater value) of the Washington oil, while the defendants were transporting crude and refined oil at equal rates for like quantities, and the relative value of the refined and crude was seven to one. Some of the places from which the oil is carried for forty cents, by the Pennsylvania R. Co., to Baltimore, about equally distant as Washington, Pa., are Warren, Clarendon, and Bradford, Pa., and Olean, N. Y.

Danger of
passing
through Pitts-
burgh as Jus-
tification.

The Olean passes fifty-one miles, and the Bradford oil 74 miles, to the line of the Pennsylvania R. Co. over the line of the Western New York and Pennsylvania R. Co., which does not belong to the Pennsylvania system, and which receives 7.27 from Olean and 8.17 from Bradford out of the forty-cent rate. This apportionment or division does not determine what the charge to the public should be, but it is not without significance in determining what are reasonable rates for the whole distance on the lines in question. The defendants so divide the fifty-cent rate that the Pittsburgh, Cincinnati and St. Louis R. Co., which is one of the lines of that system, receives 15 cents for the 28 to 32 miles over its line, or double as much as the Western New York and Pennsylvania R. Co. receives for double the distance. The Baltimore rate was fixed at fifty cents soon after the development of the Washington county oil district, now several years ago, and at a time when the rate from other points on defendant's lines, equally distant from Baltimore and other seaboard points, was but forty cents. The evidence shows that it was made on other considerations that the dangerous character of the carriage through Pittsburgh, which was first assigned as a justification for a higher rate on the Washington oil by the answer of the defendants in these proceedings.

Any traffic in oil is attended with liability to accident, but none has occurred to the defendants in the transportation of Washington oil through Pittsburgh. The accident and consequent loss to them at Brunswick, N. J., insisted upon as evidence of the exceptional hazard and liability to accident from ignition in passing valuable manufacturing plants, and other buildings in Pittsburgh, was the result of a collision of trains.

The danger from the necessary transportation through Pittsburgh must be very slight when apportioned upon all the business. It does not seem to the Commission so important that it can sensibly affect the rates which should be charged. The skill and intelligence of railroad management have considerably reduced the cost of transportation since the fifty-cent rate was made, and the Commission is of opinion this rate has now become excessive and should be reduced to the extent claimed.

The order of the Commission is that the defendants, The Pennsylvania R. Co. and the Pittsburgh, Cincinnati and St. Louis R. Co., cease and desist from charging rates on crude oil from Washington, Pa., to Baltimore, Md., in excess of forty cents per barrel.

MARTIN *et al.*

v.

SOUTHERN PACIFIC RAILROAD; THE SOUTHERN PACIFIC CO.;
THE CENTRAL PACIFIC R. CO., and THE UNION PACIFIC
R. CO.

(*Interstate Commerce Commission, May 17, 1888.*)

Interstate Commerce—Discrimination—Classification of Freight.—The use by carriers of different classifications of freight is a violation of the fourth section of the act to regulate commerce when the effect is to increase the revenue from local traffic as compared with that from through traffic.

Same—Competition—Transcontinental Lines—Canadian Pacific Railway.—As the Canadian Pacific Railway no longer competes with lines in the United States in the transportation of freight from Pacific points to Missouri river points, there is no justification for the existence of higher rates upon freight which is carried from or to points nearer the Pacific coast than from or to points on the Missouri river.

COMPLAINT by John H. Martin and M. H. Martin against Southern Pacific Railroad, the Southern Pacific Co., the Central Pacific R. Co., and the Union Pacific R. Co., alleging that a greater sum is charged by the defendants for the transportation of freight from San Francisco to Denver than is reasonable. The tariffs and freights out of which the case arises are set forth in the opinion.

Patterson & Thomas, and J. R. Doolittle for complainants.

McDonald, Bright & Fay, and Charles H. Tweed for the Southern Pacific Co.

A. J. Poppleton, Shellabarger & Wilson, and John S. Blair for the Union Pacific R. Co.

Charles H. Tweed for the Central Pacific R. Co.

WALKER, C.—The complainants are wholesale grocers doing business at Denver, Colorado. Their complaint alleges that a much greater sum is charged for transportation of freight from San Francisco to Denver over the defendants' lines than is charged to Kansas City, 600 miles further east, and that the charge to Kansas City added to the charge on the same articles from Kansas City back to Denver, makes a less rate than the charge from San Francisco to Denver direct.

The answer of the Central Pacific R. Co. disclaims any

participation in the traffic in question, its road being under lease. The answers of the Southern Pacific Co. and the Union Pacific R. Co. claim that the higher charge for the shorter haul from San Francisco to Denver than to Kansas City, is justified by the competitive circumstances and conditions attending the longer traffic, and deny that the rates are less from San Francisco to Kansas City and thence back to Denver, than from San Francisco to Denver direct.

Answers.

The commodities in respect to which the complaint was made are dried fruits and raisins produced in California. The facts which are found from the evidence are as follows:

In July, 1887, John H. Martin, one of the complainants, was in San Francisco, and there purchased 6400 lbs. of dried fruits, and 14,525 lbs. of raisins. After making inquiries of the agent of the Union Pacific R. Co. at that point, and of others, in respect to freight rates, he forwarded said articles, on August 2d, over the lines of the defendants, via Ogden and Cheyenne, consigned to his firm in Denver. The consignment aggregated 20,925 lbs., or a little more than the minimum carload shipment, which, on the lines in question, is 20,000 lbs. No rate had been definitely agreed upon in advance of the shipment, and the firm was charged at the rate of \$2.30 per hundred on the dried fruits, and \$2.65 per hundred pounds on the raisins, aggregating five hundred and thirty-two dollars and eleven cents (\$532.11) freight, which was paid on receipt of the goods at Denver on August 9th.

Facts found from evidence.

The charges so collected were assessed under the Western Classification, which was then in force upon the business in question, and which called for a third-class rate on dried fruits, and a second-class rate on raisins, in less than carload shipments. The same classification placed the same articles in carload lots, on dried fruits in the fourth-class, and raisins in the third class, the rates on which respectively were \$1.95 and \$2.30.

Complainants in the previous winter had received a carload consignment of similar goods, from San Francisco to Denver, at the rate of \$1.30 per hundred. They protested vigorously in respect to the charge collected on August 9th, of \$532.11; the former rate would have been but \$272.03.

It is obvious that the first question arising under these facts relates to what is known as "mixed carload lots," where two or more articles, each having a carload rate, are united to form a single carload in the same consignment.

Mixed carload lots.

Upon this subject the Western Classification contains the following provision:

"No two or more articles having a carload rate shall be shipped in mixed carloads at the carload rate, unless so provided for in the classification."

The same classification, under the heading "Dried Fruit," contains the following:

"NOTE.—All dried fruit taking the same classification in L. C. L. and in C. L. may be taken in mixed C. L. at the C. L. rate."

Dried fruits and raisins under this note were not entitled to be taken in mixed carloads at the carload rate because their classification was not the same. The charge exacted was in precise conformity to the requirements of the tariff and classification then in force.

The Interstate Commerce Commission, in connection with an informal complaint concerning the charges upon a certain shipment of wine and brandy in a single car from the Pacific coast had meanwhile taken up the subject of mixed carloads, in correspondence with the general traffic manager of the Southern Pacific Co.; in the course of which the fact was developed that the rule of the Western Classification, above noted, was very different from the rule of the Pacific Coast East Bound Through Freight Classification, which was and is used upon business from the Pacific coast to points on the Missouri river and beyond. Rule 12 of the latter classification reads as follows:

"*Articles Taking Different Rates—Carloads.*—Following articles of a kind, as grouped, may take rates to which each class is entitled on its own weight. Example: 12,000 lbs. of beans and 8000 lbs. of peas will take carload rate for each article. Shipment must bear one mark and be to one consignee:

"Alcohol, high wines, pure spirits, whiskey, bitters, brandy, and wine (California), ale, beer and porter; beans and peas; bones, hoofs, and horns; borax and borax pulverized; brimstone and sulphur; flour and mill stuffs; fruit, vegetables, meat and fish canned, and fruit preserved, and sauces in glass or wood; fruit and vegetables of all kinds (green); fruit dried, and raisins; leather of all kinds; macaroni and vermicelli; tea and tea dust."

This correspondence finally resulted in the application to business governed by the Western Classification of the rule in respect to mixed carloads found in said Pacific Coast East Bound Classification, upon said trans-continental line.

Applying the present rule to the shipment in question, and the charge would have been:

Dried fruits, class 4, 1.95, 6,400 lbs.....	\$124 80
Raisins, class 3, 2.30, 14,525 lbs.....	334 07

Total.....	\$458 87
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A new edition of the Western Classification has since been issued, which contains no change in respect to this subject. It appears, therefore, that under the Western Classification, which is in use by more than sixty different roads, two different rules are employed in reference to mixed carloads—one the rule appearing in the classification itself, and the other the rule recently adopted as aforesaid upon the defendant and other transcontinental roads.

The manner in which this subject has been treated by the different railroads of the country has led to great confusion, which will continue until a common principle is established.

Official Classification No. 3, used on the roads east of the Mississippi and north of the Ohio, sometimes called the Trunk Line Classification, provides as follows:

“Rule 8 (A). When a number of different articles in packages of the same class are shipped at one time by one shipper to one consignee at one point of delivery, in full car-loads, they shall be taken at the rate per hundred pounds for such class in carloads. If the articles are of more than one class the carload rate and minimum carload weight for the article in the highest class shall be charged on all the articles that make up the carload.”

In the Classification of the Southern Railway and Steamship Association a rule reads thus:

“‘Carload rates’ applies to one shipment to one consignee of one article of freight to secure reduced rates where provided for by the classification.”

The Texas Classification, on the other hand, enumerates thirty-four different groups of articles under the following note:

“The following articles as described and named below may be loaded in the same car, and on which carload rates for their class will apply.”

The Pacific Coast West Bound Classification provides that—

“On mixed carloads the less than carload rates will apply.”

While the Southern Pacific Co., in respect to local tariffs on its Pacific system, has amended Rule 7 of the Western Classification as follows:

“Mixed carloads of articles, for each of which a carload rate is named, may take the highest carload rate named on any of the articles in the lot, if for one consignee by one shipper.”

It is apparent that in every case of a shipment of a mixed car-load of goods the shipper must possess and must carefully study the classifications in use throughout the whole

route covered by the way bill in order to ascertain what the proper charge should be or whether he has been over-charged in the transaction. A shipment starting under one rule and passing into a territory where a different rule is in force is liable to have the rate increased unless the station agent at the initial point is thoroughly conversant with all the classifications; and on the other hand, such a shipment is liable to be charged through to the destination upon the less than car-load basis, while entitled to considerable reduction under other classifications before the destination is reached.

The aggregate amount of shipments in mixed car-load lots upon all the lines in the country is considerable. The inconsistencies in the treatment of such shipments by different carriers under different classifications, and frequently by the same carrier where different classifications are used for different destinations, have been a source of constant annoyance to the community, and have constituted one of the little things the multiplication of which has tended to create and intensify a feeling of irritation on the part of the public against railroads and their managers. It is excessively annoying for a shipper who has made up a carload lot in the expectation of receiving a carload rate to find that a few more dollars are exacted because the rule in force on some connecting road prohibits the carload rate in case more than one kind of articles are embraced in the shipment, although no substantial increased expense to the carriers is involved; and it is still more annoying to find that a rate apparently shown by the tariff sheets of the carrier at the shipping point is not sufficient to obtain the delivery of the goods at destination; or, on the other hand, that he might have obtained a lower rate if he had been fully apprised of the diversities prevailing in different sections or in respect to different consignments.

This whole matter is in a state of elaborate and unjustifiable confusion. It should be taken up at once by the various traffic managers and associations controlling classification in different parts of the country and a common rule immediately established. Such a rule, in order to be satisfactory and just, should be precisely fair as between the shipper and the carrier, easily comprehended in its terms, reasonable in its nature, and applicable throughout every shipment without change.

The carriers of the whole country are interested and would be entitled to be heard, either generally or through their associations, before the Commission could safely make such an order as would meet the case; at the present time, therefore, the Commission only recommends the immediate adoption of

some uniform classification rule which shall definitely control the question of mixed carload shipments.

Continuing the statement of facts in reference to the case in hand, it should be further noted that a comparison of the classifications shows that in the Western Classification, in force on business from the Pacific Coast to all points west of the Missouri river, raisins are classed higher than dried fruits, while in the Pacific Coast East Bound Classification, in force on business from the Pacific coast to the Missouri river and common points, St. Louis and common points, Chicago and common points, New York and common points, etc., California raisins in carload lots are found in the same class with dried fruits in carloads.

Different classification of raisins and dried fruit.

These diversities involved the subject in confusion, as understood by complainants and presented in their proofs. It is a source of infinite misunderstanding that classifications so widely different as the two last above named should be employed on business from the same points, in the same direction over the same lines. Separate tariffs are issued for the business conducted under these classifications, the tariff subject to the Western Classification reading "Joint Through Tariff between San Francisco, Sacramento," and other Pacific coast points, "and all points on the Union Pacific system east of Ogden in Utah, Wyoming, Nebraska, Kansas; and all points on the Denver Pacific and Kansas Division in Colorado; and all points on the St. Joseph and Grand Island railroad."

Any person having in his hands this tariff would understand that it was applicable as well to Omaha, Atchison, Leavenworth, and Kansas City, as to Denver; but in fact another tariff is used on the business from the same Pacific points to points on the Missouri river, which is subject to the Pacific Coast East Bound Classification; and this is true although the Pacific Coast East Bound Classification contains upon its face a statement of the roads which employ it "in connection with the eastern lines," apparently excluding the idea that it is used on business to the eastern terminals of the roads in question.

It is not surprising, under these circumstances, that complainants failed to obtain an accurate understanding of the rates to Missouri river points for comparison with the rates to Denver.

In the Western Classification dried fruits are rated L. C. L. Class 3, C. L. Class 4; while in the Pacific Coast East-bound Classification the same articles are rated L. C. L. Class 5, L.

C. L. Class 7. Raisins, in the Western Classification, stand L. C. L. Class 2, C. L. Class 3; while in the Pacific Coast Eastbound Classification they stand L. C. L. Class 4, C. L. Class 7.

One effect of applying the Western Classification to this article is to impose a carload rate on raisins higher than is charged on dried fruits. In the Pacific Coast Eastbound Classification raisins in carloads are in the same class with dried fruits in carloads. In less than carloads the classification of raisins is higher than that of dried fruits in both cases.

It appears from the evidence that the value of California raisins is quite uniformly less than the value of the article sold as California dried fruits. Complainants testify that no distinction in classification between California raisins and dried fruit was enforced on shipments to Denver previous to April 5, 1887. No reason is apparent why the dried fruits of California should not be construed to embrace raisins, except the fact that the classification has the word "raisins" in another place. This interpretation would have entitled the complainants to a carload rate in Class 4 of \$1.95 on 20,925 lbs.—\$408.03.

These irregularities and inconsistencies are not reasonable. In all matters of classification the influence of the Commission will be cast in the direction of clearness and simplicity. Instead of seeking for reasons justifying the existing confusion, persistent efforts should be made to efface it. It is of little consequence how such complications arose. The present question is, what is now reasonable and just in view of the principles established in the act to regulate commerce. Whatever is not so should be corrected as speedily as is practicable.

In the present case the rating of the same kind of commodities in different classes works an injustice which needs only be stated to be seen. Dried grapes are certainly dried fruit, equally with dried peaches, plums, or apricots; their value, as above shown, is less; and the word "raisins" in the Western Classification (very likely in the first instance applied to the shipments west from Chicago of the imported "raisins" of Europe), has the effect here to impose a burden which is not supported upon any reason adduced in the proofs, and which the Eastbound Classification for through business, deliberately adopted by the same carriers, does not impose.

Returning again to the complainant's statement of complaint, they allege that the rates from San Francisco to

Denver are greater than the rates from San Francisco to the Missouri river and back again to Denver, by means of which discrimination they aver that they have been driven out of the market in the vicinity of their own home. They introduced evidence in support of this allegation, which they evidently believed to be true. This evidence need not be stated in detail, for the reason that it was founded upon a natural confusion growing out of the application of different classifications to the rates in the tariff sheets. It is sufficient to say that the Commission does not find the fact to be as alleged; but, on the contrary, it appears from a careful examination of all the tariffs, classifications, rules, and circulars in force upon the lines in question that in no case does the rate charged to or from any local station now exceed the rate which would be made by adding the rate to or from the nearest terminal point to the local from such terminal point to the station in question.

Intermediate rates exceeding rates to terminus and return.

It is proper to add that this subject also is one which was taken up by the Commission on its own motion in June, 1887. As the rate sheets were then applied by the defendants, cases existed of the nature here in question. The Commission brought an example of this kind to the attention of the officials of the roads, and inquired whether there was any valid reason why a general rule should not be established in cases where the charge for the long haul is less than the charge for the short haul, providing that the local rate should never exceed the through rate with the local back from the terminus. The traffic managers of the roads in question gave assurances that a general rule of this nature should be established, and expressed their entire willingness to unite therein, and this result has been effected by the issuance of directions to agents, making the principle imperative. The language of the circular issued by the Union Pacific R. Co. is as follows:

“To agents: Announce to shippers that through rates between your station and Pacific coast common points will in no case exceed the current rates between such Pacific coast common points and the Missouri river plus the local rate between your station and the Missouri river.”

In the correspondence respecting this matter, which was considerable and which resulted in very material reductions from the original tariff rates at points between Denver and the Missouri river and between Elko and San Francisco, the Commission was exceedingly careful to disclaim the expression of any opinion upon the question of whether a greater sum could in any case be properly charged for a

shorter distance than for a longer upon the trans-continental lines.

The purpose in view was simply the immediate correction of a glaring injustice which enabled an intelligent shipper by a combination of rates to obtain an advantage over one who had less information, but who relied upon the published tariff alone, thus practically making two different rates at the same time to and from the same points in direct contravention of the act to regulate commerce. This was so obviously illegal that the Commission has insisted upon its correction forthwith, not only upon the defendant roads, but wherever it was found to exist, without reference to the underlying question of whether the rates so obtained could be justified under the rule of the fourth section and pending a more careful examination of the general subject which the Commission has had in hand.

The remaining question in the case, and one which is of very grave importance, is the consideration of whether a tariff of rates from San Francisco to Denver higher than the rates charged at the same time from San Francisco to Kansas City is justifiable under the fourth section of the act to regulate commerce.

Section four
of act — Long
and short haul
clause.

Upon this question the Commission has as yet expressed no opinion whatever, except as the subject is incidentally discussed in the opinion filed June 15, 1887, in the matter of the application of the Louisville & Nashville R. Co. for relief under section 4 of the act to regulate commerce.

The rates in force from the Pacific Coast August 9, 1887, were as follows :

TO MISSOURI RIVER.					TO DENVER.			
L. C. L.		C. L.			L. C. L.		C. L.	
Class.	Rate.	Class.	Rate.		Class.	Rate.	Class.	Rate.
Dried Fruit..	5 1.40	7 1.05			3 2.30		4 1.95	
Raisins	4 1.50	7 1.05			2 2.65		3 2.30	

It is obvious that the question presented in this naked form involves the entire subject of relative rates as between shorter and longer hauls on all the trans-continental lines; it was so presented by the parties and must be so considered by the Commission.

A brief historical statement is necessary to an understanding of the subject. Ever since the opening of the first trans-continental line it has been customary to make higher rates at intermediate points than at the terminals, the through business having been treated as competitive and the long distance rates being subject to considerable fluctuation. The competition, which at the outset, on the traffic from the

Historical
statement as
to transconti-
nental traffic.

Pacific to the Atlantic Coast, was with the Pacific Mail Steamship Co. *via* Panama and with clipper ships around Cape Horn, was afterwards more active among the various railroads themselves as they were successively constructed. But while each road entered into this competition in making rates for through traffic, they also quite consistently maintained, each for itself, the local rates to points served only by its own line. The opening of the Union Pacific Railway, the Southern Pacific Railway, the Atchison, Topeka and Santa Fe, and the Denver and Rio Grande to Ogden, successively afforded new routes from the Pacific Coast to the city of Denver, and competition was entered into among these lines for business to that point and other common points in its vicinity, as well as to the more distant points on the Missouri river and beyond. The result was that for some two years or more prior to the enactment of the act to regulate commerce the rates from San Francisco to Denver were placed on a competitive basis by all the lines; for example, dried fruits and raisins were carried for \$1.30 per hundred, as stated above; the rates named upon the tariff sheets were treated as merely nominal rates, from which rebates were allowed and drawbacks given as seemed necessary to obtain the business. A transcontinental association was at one time formed among the various lines with the object, among other things, of maintaining rates upon a uniform and more profitable basis, but it was not successful, and it finally went to pieces in February, 1886. From that time forward what is known as a "war of rates" was carried on among the various transcontinental lines in respect to all competitive business. This was conducted with considerable bitterness and involved the continual use of secret rates, rebates, drawbacks, underbilling, and devices of various kinds by which business was taken from one to another as opportunity offered.

An effort was made to put an end to this confusion in the fall of 1886, but without any very substantial success, and the "war" continued until about the time of the taking effect of the act to regulate commerce. The rates which were made on long distance business during this period were very low, and, to a considerable extent, unremunerative. There can be no doubt that a great deal of business was hauled at an absolute loss to the carriers; in fact it appears that very little regard was paid to the price obtained, tonnage being the object principally aimed at in respect to competitive freight.

Meanwhile the rates at intermediate points did not participate in these reductions, and the complaint was, in many instances, undoubtedly just, that shippers to and from the local stations were obliged in some measure to compensate the

carrier for loss sustained on business carried by their doors at greatly lower rates for longer distances.

Under the influence of the passage of the act to regulate commerce, approved February 4, 1887, the trans-continental lines consulted with one another and agreed upon a general system upon which their tariffs should be constructed in compliance with the provisions of the new law. The opinion was entertained by the managers of some of the roads that section 4 of the act did not prohibit a greater charge for a shorter distance over the same line, in the same direction, when the circumstances and conditions were dissimilar, and that the competitive circumstances controlling the business of the long-distance traffic were such as to constitute dissimilar circumstances and conditions under the language of the section. This view did not universally obtain, the managers of some of the lines being unwilling to take the responsibility of so construing the section, and tariffs were prepared, published, and issued on April 5, 1887, contemporaneously with the taking effect of the law, under which the language of section 4 was literally applied upon all trans-continental business. Under these tariffs, which were all subject to the Western Classification, the rates to Missouri river common points, St. Paul, Minneapolis, Galveston, and Houston were as follows:

Class.	1	2	3	4	5	A	B	C	D	E
	4.00	3.50	3.00	2.50	2.25	2.10	1.75	1.40	1.10	1.00

The rates to Mississippi river common points, Chicago common points, and New York common points were progressively higher than the above. The rates named above for Missouri river common points were applied for about 350 miles west of the river, from which point they gradually decreased to Denver. The Denver rates were as follows:

Class...	1	2	3	4	5	A	B	C	D	E
	3.00	2.65	2.30	1.95	1.70	1.50	1.20	.95	.85	.80

And were applied from Denver to a point near Green river, over 300 miles west from Cheyenne. From Green river the rates again diminished very gradually to the Pacific Coast.

The result of the enforcement of the aforesaid previously unknown rates from the Pacific to the Missouri river and points beyond, was what the carriers expected, and perhaps desired. The tariff for this long-distance business was regarded by shippers as prohibitory. Shipments ceased, and the Interstate Commerce Commission was at once importuned, by telegrams, letters, and petitions from a large variety of business interests on the Pacific slope, to interfere for their

relief. Applications were also filed by the carriers with the Commission for relief upon this traffic from the operation of the fourth section under what was understood to be the power conferred in the proviso attached to the aforesaid section. These matters were brought to the attention of the Commission immediately after its organization in connection with many other similar applications from other portions of the country. The course pursued by the Commission is stated in its first annual report. For the reasons and upon the considerations therein set forth,

"The Commission, after having made sufficient investigation into the facts of each case to satisfy itself that a *prima facie* case for its intervention existed, made orders for relief under the fourth section where such relief was believed to be most imperative. These orders were temporary in their terms," and were expressed to be in force for a given number of days, "until the Commission can make a complete examination of the matters alleged."

An order of this nature was made on the application of the Southern Pacific Company, dated April 23, 1887, by which said company was relieved from the operation of section iv. of said act for a period not greater than seventy-five days, upon the following traffic, to wit:

"1st. Between San Francisco, Sacramento, Stockton, Marysville, San José, Oakland, Los Angeles, and San Diego, in California; Portland and Astoria, in Oregon; Tacoma, in Washington Territory; Victoria in British Columbia, and El Paso, in Texas, on the one hand, and New York, Boston, Philadelphia, Baltimore, Newport News, Richmond, and all points commonly rated with them or either of them, on the other hand.

"2d. Between the same western points and Chicago, St. Louis, Memphis, New Orleans, and points east thereof.

"3d. Between the same western points and El Paso, Galveston, and Houston, in Texas, and points on the Missouri river and east thereof."

This order was subject to the restriction that the rates at intermediate stations should not be raised from the rates in force prior to April 20th.

Similar orders were made upon the application of the other trans-continental lines, limited in like manner to traffic between the Pacific coast on the one hand and the Missouri river and points beyond on the other. All of said orders expired early in July, 1887.

The subject of the application of the fourth section to the business of the trans-continental lines was quite fully investigated by the Commission, in connection with their general

examination of the short-haul question during the ninety days first ensuing its organization.

Immediately upon the issuing of the aforesaid temporary order the defendant carriers announced a tariff to take effect April 27, 1887, under the Pacific Coast East-Bound Classification, which established a line of rates from \$3.50 on the first class to 85 cents on the ninth from San Francisco to the Missouri river. These rates, on May 25, 1887, were further materially reduced, and as so established remained in force on August 1, to wit:

Class...	1	2	3	4	5	6	7	8	9
	2.80	2.24	1.75	1.50	1.40	1.23	1.05	.88	.70

Meanwhile no substantial change was made during the year 1887 in respect to the tariffs established April 5 for all intermediate points between the Pacific coast and the Missouri river; the only important modification being that which was effected under the circulars mentioned above which operated to give shippers residing in the vicinity of the Missouri river and of the Pacific coast the benefit upon direct shipments of the right which they had to ship to the terminal and return over the same ground.

The reduction to the rate which was established for through business on April 27 was made by the carriers with full knowledge of all existing water competition, the facts concerning which were laid before the Commission at that time with great detail. In justification of the subsequent reduction on through business which took effect May 25, 1887, the carriers pointed to the competition of the Canadian Pacific Railway, which was practically a new factor in the situation, and which became energetic and active in the spring of 1887, contemporaneously with the taking effect of the act to regulate commerce. A new line was thus opened, running for sixteen hundred miles or more through a foreign country, which competed on the streets of San Francisco for business from the Pacific coast to the Missouri river, Chicago, New York, and Boston. This competition was so managed as to make itself felt successively upon one commodity and another and at various points, forming a continual menace to the through business of the transcontinental lines in both directions, without undertaking the carriage of any very considerable amount of tonnage, except at the outset, when large consignments of sugar were shipped east for a few weeks over the Canadian line.

A steamer of the Pacific Coast Steamship Co. left San

Francisco weekly for Vancouver, where its freight was loaded upon the cars of the Canadian Pacific Co. and taken east across the mountains to be delivered *via* St. Paul or *via* more eastern routes, according to its destination. The rates of freight established for each sailing of these steamers have been regularly filed with the Commission; and the Commission has also obtained accurate information respecting the amount and destination of all goods shipped in each steamer sailing from San Francisco to Vancouver between April 1 and December 31, 1887. The shipments of May 13 and May 21 were each a little over one thousand tons; the average of the thirty-four remaining shipments was about 150 tons each. The goods carried by this route to strictly Missouri river points were, 944 tons of refined sugar (900 tons of which were carried on May 13), 7 carloads of beans, 2 carloads of dried fruit, 4 carloads of canned fruit, and 1 carload of bags. These articles were taken at rates lower than the rates in force at the time on the defendant roads. The Canadian Pacific rate on dried fruit to Chicago was at different times ninety cents and one dollar.

Same—Canadian Pacific competition.

It does not appear that the Canadian Pacific line charged a less rate to St. Paul and other points in the United States near the northern boundary than it charged to Omaha, Kansas City, Chicago, New York, and other more distant points in the United States on the same line in the same direction. It is not known, however, that any limitation exists upon the said line in respect to charging any desired rate to and from intermediate points in the Dominion of Canada, without reference to the rates established at more distant points, either in Canada or in the United States; and higher rates to and from intermediate points are in fact there charged. Nor does it appear that the Canadian business of this carrier is subject to any statutory prohibition of rebates, drawbacks, or other forms of unjust discrimination, or to any restrictions in respect to preferences between persons or localities. So far as appears, its Canadian rates may be changed at will and be varied from at pleasure. A general revision of railway laws now pending in the Canadian Parliament, introduced pursuant to the report of a Commission which has given much consideration to the question, provides as follows:

“No company in fixing any toll or rate shall, under like conditions and circumstances, make any unjust or partial discrimination between different localities, but no discrimination between localities which, by reason of competition by water or railway, it is necessary to make to secure traffic, shall be deemed to be unjust or partial.”

The policy of the Canadian Pacific Co. during the period following the taking effect in the United States of the act to regulate commerce was to maintain its rates between San Francisco and the Central and Eastern States, upon leading articles, a little below the rates made by the transcontinental lines in this country ; this was designed to compel the recognition by the latter of the general principle which it asserted, that rates upon a circuitous line between like terminals should be lower than rates upon the direct line, in order to enable the longer route to obtain a certain portion of the traffic. In other words, that natural disadvantages, operating to the prejudice of a route competing for the business in question, should be compensated by the privilege of offering to the public a lower rate.

And that policy was pursued with sufficient energy to produce at last the effect desired. On January 16, 1888, an arrangement was made by which the Canadian Pacific Railway became a member of the Transcontinental Association. The trans-continental lines, including the Canadian Pacific, are now working under a tariff which fixes rates from Pacific coast points to Missouri river common points and easterly to New York, that are considerably advanced from the low rates which prevailed after May 25, 1887. The new tariff provides that on rates from San Francisco to Chicago and the East *via* the Canadian Pacific Railway certain differentials are to be deducted amounting to a reduction of from five to ten per cent in favor of the Canadian road. No differentials are given that line on shipments to and from the Missouri river ; the result of which is that business from the Pacific coast to Missouri River points is not now competed for by the Canadian road.

The competition of the Canadian Pacific Railway, a foreign railroad not subject to the provisions of the act to regulate commerce is the only justification relied upon by the defendants for charging higher rates at intermediate points in the case now under consideration.

The foregoing facts present the following question: Under the circumstances and conditions stated, is a higher rate justifiable for the shorter haul from San Francisco and Pacific coast common points to Green river, Cheyenne, Denver, and common points, than for the longer haul to Kansas City, Omaha and other Missouri river points?

Question presented.

Before proceeding to the consideration of this question it is important to obtain exact knowledge of just what disparity now exists between the rates in question, and how it is practically effected.

It appears from the proofs, and from the files in the office of the Commission, that the rates in force August 9, 1887, from San Francisco to Denver, upon the ten classes of the Western Classifications, were as follows:

Disparity of rates between intermediate and terminal points.

Class...	1	2	3	4	5	A	B	C	D	E
	3.00	2.65	2.30	1.95	1.70	1.50	1.20	.95	.85	.80

It also appears that the rates in force at the same time from San Francisco to the Missouri river, upon the nine classes of the Pacific Coast East-Bound Classification, were as follows:

Class...	1	2	3	4	5	6	7	8	9
	2.80	2.24	1.75	1.50	1.40	1.23	1.05	.88	.70

It further appears that the class rates from the Pacific Coast to Denver, under the Western Classification, since February 14, 1888, are as follows:

Class...	1	2	3	4	5	A	B	C	D	E
	3.00	2.60	1.90	1.55	1.30	1.40	1.20	.95	.85	.80

And that the class rates put in effect January 16, 1888, from San Francisco to Missouri river points, under the Pacific Coast East-Bound Classification, are as follows:

Class..	1	2	3	4	5	6	7	8	9
	3.00	2.40	1.90	1.65	1.55	1.40	1.25	1.10	1.00

It would at first appear from a comparison of the foregoing tables that the rule of the fourth section had now been substantially put in force; and that, excepting in Class 2, no greater charge is at the present time made from the Pacific coast to the Missouri river than to Denver.

Such a comparison, however, does not exhibit the true situation, for the reason that the classifications are not the same.

The Pacific Coast East-Bound Classification, which is applied only upon long-distance freight, to the Missouri river and beyond, was evidently prepared for the purpose of facilitating a free and cheap movement of California products to competing centres of trade in the East. The Western Classification, under which all the local business of the transcontinental lines is handled, is in many instances higher. Special or commodity rates have also been customary on many articles, which are thereby taken out of the classification altogether.

Use of different classifications.

It is apparent that the use by the carriers in question of different classifications, when the effect is to increase their

revenue from their local traffic as compared with that obtained from through traffic, accomplishes a violation of the fourth section of the act to regulate commerce no less potent in its results than would be the imposition of a higher tariff upon the same class in the same classification, and not less unlawful.

Since the hearing of this case, the through rates have been increased from the exceedingly low competitive rates which prevailed in the summer of 1887, as above shown, the tariff of January 16, 1888, being united in by the Canadian Pacific, as well as by the lines in the United States.

An East-Bound Through Freight Tariff, taking effect March 10, 1888, had the effect still further to reduce the disparity upon many important articles of traffic. Meanwhile the rates to Denver and its common points, on classes 2, 3, 4, 5, and A, were reduced, as above shown. The Joint Freight Tariff, San Francisco to Denver, in effect February 14, 1888, also names a commodity rate on "Fruit, dried, and Raisins, straight or mixed." Applying the present tariffs to the articles here in question, and we have the following result:

	To Missouri River.		To Denver.	
	L. C. L.	C. L.	L. C. L.	C. L.
Dried Fruit.....	1.55	1.25	1.85	1.50
Raisins.....	1.65	1.25	1.85	1.50

The shipment in question at the present Denver rate would have cost \$313.87.

The tariffs now in effect have been examined by the Commission with much care. It is found, that on many articles the rates from the Pacific coast to Denver are no greater than to points further east. The differences which remain are principally the result of different classifications. In fact, the subject of classification lies at the foundation of any attempt to place the through and local business of the transcontinental lines upon a relatively just and intelligible basis. Nothing in the nature of a stated proportion can at present be discovered. The matter is now in a state of crystallization among the carriers themselves. The changes that have been made within the past three months in the way of equalization of tariffs and doing away with differences that have long been maintained against interior points, are very noteworthy. So long as the carriers are actively engaged in a rearrangement of the tariffs and classifications, and while the changes made are in the direction of conformity to the law, it is better that the details of the matter be not interfered

Differences the result of different classifications.

Increase of through rates.

with by the Commission. There are many factors in the situation which are obviously uncertain. The subject must be dealt with as somewhat experimental. It is not yet known that the present through rates can be maintained with a reasonable certainty of permanence, although the situation supports the belief that they may be. The effect of the changes that are being made upon the revenues of the carriers has not yet been ascertained. Radical measures taken suddenly might produce unforeseen disasters.

As the matter now stands, however, and while Canadian competition does not seek to participate in the Missouri river business, it is impossible for the Commission to discover any adequate ground upon which the defendants can claim that the circumstances and conditions of the traffic from San Francisco to Denver are so materially different from those of the traffic from San Francisco to the Missouri river as to warrant them in charging a greater sum for the shorter distance.

Nothing to warrant charging greater sum for shorter distance.

The distance from San Francisco to Kansas City is 2098 miles, to Denver 1455 miles—a difference of 543 miles, or more than one fourth of the entire haul, in favor of Denver.

Whatever may be thought of the situation as a theoretical question, or in view of the laws or customs of other countries, the will of the supreme law-making authority of this country has been distinctly stated in the 4th section of the act to regulate commerce, and no valid reason now appears to prevent the rule of the statute being enforced in respect to the traffic in question.

In reaching this result, no modification is intended in respect to the construction of the statute which was announced in the case *In re Louisville & Nashville R. Co.*, 1 I. C. C. R. 31; s. c., 29 Am. & Eng. R. R. Cas. 16. The Commission, as yet, has found no reason to change the rules there laid down, and this decision is in strict conformity therewith.

The long-distance rates in question from the Pacific coast to Missouri river points are not now subject to "actual competition of controlling force in respect to traffic important in amount" engaged in by Canadian roads which are not subject to the provisions of our statute. On the contrary, the Canadian Pacific has retired from such Missouri river business as it at one time undertook to compete for, and the through rates of the roads in the United States have accordingly been substantially advanced.

The great distance of Denver from the Missouri river, of itself, denotes an obvious impropriety in the charges to that

point, which exceeds those to Kansas City. The longer haul exceeds the shorter, in the given case, by several hundred miles.

No fact is shown to exist upon which the greater charge for the shorter haul in the case stated can be justified at the present time.

The Commission, at more recent hearings involving questions to some extent though not altogether similar, has been informed that the traffic managers of the defendant roads are now engaged in considering a general reconstruction of their tariffs and classifications, in view, among other things, of the higher rates now obtained upon through business, and in the light of suggestions informally made by the Commission upon various matters of detail. A reasonable time should be allowed for the completion of the work, which is necessarily complicated, and which involves much correspondence and conference. Believing that an effort is being made in good faith to readjust the local tariffs of the transcontinental lines, and to simplify and combine the classifications in use upon through and local business in accordance with the requirements of the law and the views of the Commission, it is considered best to leave the matter for the present in the hands of the carriers, and allow an opportunity for them to complete the work in which they are engaged.

No order, therefore, will be entered in this case for a period of sixty days from this date, and further proceedings are for the present suspended.

KENTUCKY AND INDIANA BRIDGE CO.

v.

LOUISVILLE AND NASHVILLE R. CO.

(Interstate Commerce Commission, August 2, 1888.)

Interstate Commerce—Bridge Company—Common Carrier.—A bridge company incorporated for the purpose of constructing a bridge across a river which forms the boundary between two States, is a common carrier within the meaning of the interstate commerce act, although the purpose for which the bridge was constructed was purely to afford terminal facilities, and facilities for exchanging traffic between other railroads, and as such common carrier, it is entitled to demand facilities from other railroad companies, whose tracks its road intersects for the exchange of traffic.

Same—Exchange of Traffic—Facilities.—The fact that a railroad corporation has already a number of yards in which it exchanges traffic with other companies, does not entitle such company to refuse facilities for the exchange of traffic to a new carrier, although such carrier connects at a point where there is no yard, and there tenders the freight, but such new carrier must bear its own share in making provision for tariff exchange.

Same—Traffic Agreement—Competing Bridges.—The Louisville & Nashville R. Co., and the Ohio & Mississippi R. Co., on the construction of a bridge across the Ohio River by the Louisville Bridge Co., entered into a contract, by which they agreed to transport their traffic across the river by such bridge, the expenses being borne by the companies in proportion to the cost of the bridge and expense of maintenance and interest on the capital of the bridge company. The Kentucky & Indiana Bridge Co. constructed a rival bridge, and the Ohio & Mississippi R. Co. contracted to convey its traffic across the new bridge. *Held*, that the Louisville & Nashville R. Co. could not lawfully refuse to receive, for transportation over its line, traffic brought across the new bridge in violation of the contract made with it; its remedy, if any, being by an action upon the contract for damages for its breach.

Same—Public Convenience—Legislative Authority.—For the purpose of the interstate act, railroads in existence which are created under legislative authority, must be conclusively presumed to be for the public convenience, and one railroad company cannot refuse to exchange traffic with another on the ground that the road of the latter is not required to supply the public, and that the public were sufficiently furnished with means of transportation by other roads in existence before such road was constructed.

Same—Constitutional Law.—Impairing Obligation of Contract.—The regulations of the act to regulate commerce are in the nature of police laws, and the fact that it incidentally affects contracts existing at the time of its enactment, does not bring it within the prohibition against laws which impair the obligation of contracts.

PETITION by the Kentucky & Indiana Bridge Co. against the Louisville & Nashville R. Co. to compel the latter to exchange traffic with the petitioner. The petition and answer are set forth in the opinion and sufficiently show the nature of the case.

E. T. Trabue, Ramsey & Maxwell and *Bullitt & Shield* for complainants.

Ed. Baxter and *Lyttleton Cooke* for defendants.

COOLEY, Chairman.—The petition in this case avers that petitioner is a corporation created by the consolidation of an Indiana corporation and a Kentuckian corporation of the same name, and exists under and by virtue of the laws of the States of Indiana and Kentucky; that the Louisville & Nashville R. Co., defendant herein, is a corporation created and existing under the laws of Kentucky and Tennessee.

**Averments of
petition.**

That petitioner owns and operates a bridge for steam railway and other purposes across the Ohio river between the

city of New Albany, Indiana, and the city of Louisville, Kentucky, and a railway extending from New Albany across the bridge into Louisville; that defendant owns and operates a railroad extending from the city of Louisville southwardly through the State of Kentucky to the city of Nashville, in Tennessee, with various branches and connecting roads.

Petitioner avers that in the city of New Albany petitioner's railway connects with the railway of the Ohio & Mississippi R. Co., which operates roads extending thence into the States of Indiana, Illinois and Ohio, thereby reaching the cities of Cincinnati and St. Louis. Petitioner's railroad at New Albany aforesaid also connects with the railroad of the Louisville, New Albany & Chicago R. Co., which extends from New Albany to Chicago, and over and by means of the railways mentioned petitioner reaches all the principal points of commerce in the United States north of the Ohio river.

It avers that its railway also extends from the southern end of its bridge in Louisville to the railway of the defendant, connecting therewith at the intersection of Seventh street and Magnolia avenue, in the said city of Louisville, and in defendant's freight yard; that the connection is complete, and affords an easy and convenient means of interchanging cars, freight, and all business between the petitioner and defendant and any railway company using or which may use the railway of petitioner, and such interchange of cars, freight, and other business can be made without any use of the terminal facilities of defendant.

That by section 18 of the charter of defendant, enacted by the legislature of Kentucky, it is provided that any railroad or railway thereafter constructed under the authority of the legislature of Kentucky, may connect and join with the railroad of defendant; and the railway of petitioner has been constructed in said city pursuant to the authority of the legislature of Kentucky since the date of defendant's charter.

Petitioner avers that it is a common carrier, and engaged in the transportation of freight and passengers wholly by railroad, between the cities of New Albany and Louisville, aforesaid, subject to the provisions of the act to regulate commerce; that the defendant is a common carrier of freight and passengers over its railway and engaged in interstate commerce; and that petitioner and defendant, respectively, habitually hold themselves out to the public as common carriers of freight and passengers over their lines of railroad, respectively, subject to the provisions of said act to regulate commerce; that by its charter petitioner is required to receive from and for the Ohio & Mississippi R. Co., the Louisville,

New Albany & Chicago R. Co., and persons, or shippers demanding it, cars to any point on or beyond and by way of direction, and that it is now receiving freight from the two companies last mentioned and individuals at New Albany transportation over its bridge and railway to points and by way of the railroads of the defendant has tendered to defendant at said railroad at Seventh street and Magnolia transportation by defendant from that point of connecting railroads.

But petitioner avers that in violation in combination and conspiracy with Co., a corporation owning the only Ohio river between Louisville and New Albany, other railroad companies interested in the bridge, for the purpose of preventing transportation over petitioner's bridge and compelling transportation of freight across the Ohio river made over the bridge of the Louisville and Nashville, refused and now refuses to interchange freight on the railways of petitioner and defendant, or to permit petitioner, or railway companies using its line of connection, cars of freight tendered to petitioner for transportation over its railroad to points therefrom by way of said railroad, or to deliver freight to said railroad company using its track, freight tendered to defendant's railroad at Louisville for, or for transportation over petitioner's railway or any railroad connecting with New Albany, although defendant affords no interchange of traffic to said Louisville.

Wherefore, petitioner prays that the order made by the order of the Commission to interchange freight between petitioner, and with the railway company of the Louisville and Nashville railroad, at said point of connection at Seventh street and Magnolia avenue, and to receive from petitioner and other companies using its railroad all freight tendered to them to said defendant for transportation over its railroad beyond and by way of its railroad or railway to petitioner and to the railroad company of the Louisville and Nashville railroad, at said point of connection, at Louisville over defendant's railroad at Louisville, or to railroad companies using its line of connection, or to points on the line of petitioner's railroads of companies using its track.

The answer of the defendant is very long, and it is not material for the purposes of this case that it be re-
 Answer of de- cited at length. The existence of the petitioner is
 fendant. conceded and its ownership of the bridge across the Ohio river, but it is not conceded that it is a common carrier. Defendant says it is advised by counsel that under its charter other companies thereafter incorporated under the laws of Kentucky have the right to connect with defendant's road, but that defendant is not compelled to make any such contracts with petitioner as are necessary to be made in all cases where an interchange of traffic between two companies is to be conducted.

Defendant describes its freight yards in the city of Louisville, of which it has four; it says that the physical connection made by petitioner's railway with defendant's railway is between the third and fourth of these yards, and it denies that such connection affords any easy and convenient means of interchanging traffic between defendant and petitioner, or between defendant and the railways using the railway of petitioner; and it also denies that such interchange can be made without the use of defendant's tracks and terminal facilities by petitioner; and defendant specifies many reasons why the place of such connection is not a convenient place for the interchange of business.

Defendant admits that it has refused and now refuses to interchange traffic between the railways of defendant and petitioner at the point of connection at Seventh street and Magnolia avenue, or to receive from petitioner or from railways using its track at that point cars of freight tendered to it for transportation, or to deliver to petitioner at that point freight arriving by defendant's railroad at Louisville consigned to points on petitioner's railway or any railroad connecting therewith at New Albany. It admits that it affords facilities for the interchange of traffic passing over the bridge of the Louisville Bridge Co., but this is done at one of respondent's regular yards, where it has all the force and facilities necessary for the business.

Defendant denies that either in the interchange of traffic which crosses the bridge of the Louisville Bridge Co., or in refusing to interchange the traffic which crosses the petitioner's bridge, defendant is acting in violation of law or in conspiracy with the Louisville Bridge Co. or with any railroads interested therein. It is true there are two bridges across the Ohio river at Louisville. Defendant on June 5, 1872, entered into a written contract with said Louisville Bridge Co. and with the Jeffersonville, Madison and Indianapolis R. Co. and the Ohio and Mississippi R. Co., to the

effect that freights coming from points north of the Ohio river destined to defendant's railroad or to railroads connected therewith should be transported over the bridge of the said Louisville Bridge Co. Defendant has felt and still feels that it is legally and morally bound to comply with said contract, in letter and in spirit, and one of the reasons why defendant has refused to interchange traffic with petitioner at the point of connection of their tracks is because in defendant's opinion it would be a violation of said contract, and of other contracts existing between defendant and other parties, entered into in good faith and to subserve the interest and convenience of its patrons.

Defendant then proceeds to state the following facts: Prior to the construction of the Louisville Bridge Co.'s bridge all freights, mails, and express goods to and from points north of the Ohio river destined to defendant's road and its connections had to be ferried across the river on boats and hauled through the streets of Jeffersonville and Louisville. The difficulties and expense of this traffic are stated, and because of these defendant says it was concluded to bridge the river, and defendant subscribed \$300,000 of the stock of the Louisville Bridge Co. The bridge was built at a cost of \$2,300,000, represented by \$1,500,000 of stock and \$800,000 of bonds.

Defendant's
statement of
facts.

About the time the bridge was completed, to wit, June 5, 1872, a written contract was entered into between the Louisville Bridge Company and the Jeffersonville, Madison and Indianapolis R. Co., the Ohio and Mississippi R. Co., and the defendant, whereby in substance it was agreed that the tolls and charges for the use of said bridge by said railroad companies should be fixed at rates that should not be in excess of a sum sufficient to produce in the aggregate an amount equal to the cost and expense of keeping the approaches and its bridge in repair, paying a semi-annual dividend of 6 per cent upon the capital stock, the interest upon the bonds, and a sinking fund sufficient to pay off the bonds at maturity, and an amount sufficient to keep up the corporate organization of the bridge company, including taxes; and in the event the bridge should be destroyed by casualty, additional 7 per cent bonds were to be issued by the bridge company, and sufficient charges were to be made against said railroad companies to meet the interest and sinking fund upon such additional bonds.

It was provided that said charges and tolls should be from year to year reduced in proportion to the reduction of interest on said bonds by the operation of said sinking fund, and that they should always be the same to each of said railway

companies. Said contract contemplated that other railroad companies should thereafter be allowed to use said bridge; that all tolls and charges paid by such other companies should be applied to and form part of the fund provided by the contract for the payment of expenses, sinking fund, etc.

It will be seen by this statement that as the sinking fund increases and the amount of outstanding bonds is diminished, defendant's charges and tolls for the use of the bridge are proportionately diminished. Said bonds are now nearly all paid off; when fully paid the tolls and charges will be reduced to a sum sufficient to keep the bridge in repair, maintain its corporate organization, pay taxes, and the dividend on its stock. It will further be seen that when other railroad companies are induced to use said bridge the payments made by them will also tend to reduce the tolls and charges which defendant must pay.

It is therefore greatly to the interest of defendant to continue its contract arrangement with the Louisville Bridge Co., and it is proper that it should endeavor by all fair and legal means to induce other railroad companies to use that bridge. It is also manifest that if petitioner can succeed in getting the Ohio and Mississippi R. Co., or other companies, to withdraw their traffic from the Louisville Bridge Co., or in compelling defendant to divert any portion of its traffic to petitioner's bridge, it will proportionately increase the tolls and charges which defendant will have to pay to said Louisville Bridge Co. in discharge of its obligations under the contract of June 5, 1872.

Defendant then refers to other contracts supposed to have some bearing upon the controversy; avers that it was authorized to enter into them by its charter; says that the bridge of the Louisville Bridge Co. is the natural connection and traffic ally of defendant, while the parties concerned in petitioner's company are the avowed enemies of defendant, and are doing all that is in their power to injure it. The answer closes with an averment that defendant has no traffic arrangement with petitioner; that it does not interchange traffic with other companies except in pursuance of agreed arrangements, and that petitioner has no license or permission from defendant to make use of any part of its roads, or to transport persons or property thereon.

Upon the issues thus presented the case was heard on testimony taken orally, and the parties presented their views in oral arguments and afterwards in elaborate briefs. We find the facts established by the evidence, so far as we deem them important to the decision of the legal questions raised, to be as follows:

The Louisville Bridge Co. was incorporated by the Commonwealth of Kentucky March 10, 1856, and the charter was amended February 19, 1862. The amended charter contains provisions giving the company authority to contract with railroad companies "to warrant the annual profits of the bridge to be built by said company shall be equal to the keeping the bridge in repair and of its operation, and that the net earnings shall be equal to six per cent on a cost of one million dollars." Also to contract with any railroad company "for the annual use of said bridge by the cars or for the purposes of said railroad company." Also that "any railroad company incorporated by the Commonwealth of Kentucky may lawfully subscribe to the stock, or make the guarantees and agreements authorized by the preceding sections of this act, when authorized by the stockholders at some general meeting."

Facts established by the evidence.

By act of Congress approved February 17, 1865, a previous act of July 14, 1862, was so amended as to authorize the Louisville & Nashville R. Co. and the Jeffersonville R. Co. (stockholders in the Louisville Bridge Co.) to construct a railroad bridge over the Ohio river at the head of the falls of the Ohio, and the bridge when constructed was declared to be a lawful structure.

Under the legislation above mentioned the capital stock of the Louisville Bridge Co. was subscribed for by the Jeffersonville, Madison & Indianapolis R. Co., the Louisville & Nashville R. Co., and certain other corporations and individuals, the Louisville & Nashville R. Co. subscribing for \$300,000 thereof.

On June 5, 1872, a contract was entered into between the Louisville Bridge Co., party of the first part, the Jeffersonville, Madison & Indianapolis R. Co., party of the second part, the Ohio & Mississippi R. Co., party of the third part, and the Louisville & Nashville R. Co., party of the fourth part, in which it was recited that the capital stock of said bridge company was \$1,500,000 and its mortgage debt \$800,000, evidenced by bonds to mature December 1, 1888, bearing interest at seven per centum, payable semi-annually.

The contract contained stipulations as follows:

First. "That the second, third, and fourth parties agree respectively to use said bridge as is hereinafter covenanted."

Second. That the first party agrees "that the tolls and charges over and for the use of said bridge and its tracks owned by the first party in the transportation of freight, passengers, mails, and other goods received from or delivered to the roads of said second, third, and fourth parties, per ton and per passenger, or per car, engine, or other means of

transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge owned by the first party, paying a dividend semi-annually of six per cent on said capital stock of fifteen hundred thousand dollars, the interest upon said bonds as the same matures and becomes payable, a sinking fund sufficient to pay off said bonds of eight hundred thousand dollars at maturity, the amount necessary to keep up the corporate organization of the first party, with its proper officers and servants, and such taxes as may be chargeable against said bridge company on said bridge or other property pertaining thereto or otherwise."

Third. "It is understood and mutually agreed that said charges and tolls shall from year to year be reduced, in proportion to the reduction of interest on said bonds by the operation of said sinking fund."

Fourth. "That the tolls and charges shall always be the same to each of the second, third, and fourth parties."

Fifth. "That the tolls and charges to other railroads, or railroad companies, for like use of said bridge and the approach owned by the first party, shall not be less than those charged to or incurred by the parties hereto."

Sixth. "That all such tolls and charges paid by other railroads or railroad companies shall be applied to and form a part of the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties."

Seventh. "In the event said bridge or its appurtenances shall be injured by floods, ice, or other casualty, or by crystallization of the iron or other inherent decay, so as to render the same useless or dangerous, and it shall become necessary to rebuild the whole or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of guaranteed rates and charges," then an additional number of bonds were to be issued to yield a fund sufficient to renew and repair the bridge, and in that event the tolls and charges were to be increased, so as to provide for the payment of the interest on such additional bonds and to provide a sinking fund to retire them at maturity.

Eighth. The second and third parties each severally agrees "that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on and over their roads, to and from Louisville and to and from points which require their passage over the Ohio river at or

near Louisville, during the existence of this agreement, and will pay punctually to the party of the first part the tolls and charges hereinbefore provided for the use by them, respectively, of said bridge and the tracks and approaches thereto owned by the first party."

Ninth. "The party of the fourth part covenants with each of the parties of the first, second, and third parts, their respective successors and assigns, that it will deliver to the said party of the first part, to be passed over the said bridge, or to the parties of the second or third parts, or to such other railroad company or companies as may for the time being be transferring freight, passengers, mails, express matter, and other goods over the said bridge, all the freight, passengers, mails, express matter, and other goods carried on and over its road, or any part thereof, destined for Jeffersonville, in the State of Indiana, or any other points which require their passage over the Ohio river at or near Louisville during the existence of this agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of tolls and charges, hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party."

Tenth. "The approach to said bridge at the north end thereof was owned by the second party, and the third party agreed with the second party to use said approach to said bridge in going into and over said bridge, and it was agreed between said second and third parties that all trains, cars, and engines passing over said approach, and over said bridge, 'shall be under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains, cars, and engines of the second party, in the premises, shall be equally applicable to the trains, cars, and engines of the third party, each being dealt with alike.' . . . 'And the second party hereby covenants to furnish all needful and sufficient engines for the service hereinbefore mentioned, and at all times to transfer with the same promptness and care over the said bridge the trains, cars, engines, and traffic of the parties of the third and fourth parts, that it does the trains, cars, engines, and traffic received from or to be delivered to its own road, the intention being that each of the parties shall enjoy equal facilities over said approach and bridge.'"

Eleventh. "For the service aforesaid of said engines of the second party, and the conducting and management of the same, and of cars, trains, and bridge, over the said approach and bridge, the second party shall be allowed a reasonable compensation, to be fixed on signing this agreement, to be

apportioned between the parties hereto in proportion to the service to each, per ton and per passenger, or per car, engine, or other means of transportation as the parties may hereafter agree."

There was then a provision for the arbitration of differences arising between the parties under the contract, and a final clause as follows :

" This contract shall continue in force and operation until it shall be terminated by some one of the parties thereto giving notice in writing to the other parties, of its intention to terminate the same at the expiration of two years from the giving of such notice ; at the expiration of which two years the same shall terminate as to all the parties thereto included in such notice."

Since the contract was entered into, the Louisville, New Albany & Chicago R. Co. and the Louisville, Evansville & St. Louis R. Co. have been allowed to use said bridge and its approaches in substantial accordance with its provisions. The tolls and charges for the use of the bridge have been continually growing less as the traffic over it has increased. Several years ago an arrangement was made whereby the dividends agreed to be paid upon the capital stock of the bridge company were reduced from six to four per cent semi-annually. The sinking fund provided for by the contract is now sufficient to pay off the bonds, and it is expected that they will be paid off when they mature, in December next.

The complainant, the Kentucky & Indiana Bridge Co., was incorporated by the Commonwealth of Kentucky by special charter April 6, 1880. It was empowered " to locate, build, construct, and maintain, under the laws of the United States, a bridge for railway, wagon, street-railway, and all other purposes, between the cities of Louisville, Kentucky, and New Albany, in the State of Indiana, from any convenient and accessible point within the limits of the city of Louisville, or within one mile thereof, to any point in the city of New Albany, Indiana, or within one mile thereof," and to acquire by purchase or condemnation the necessary real estate for that purpose. It was further given power, " to lay down on said bridge a single or double track for railroad cars or street cars, or for wagons or other vehicles, and all animals, and to erect foot-ways for passengers, and to charge for the use thereof reasonable tolls ; . . . and may also run any line of railway through the city of Louisville upon such terms as may be prescribed by ordinance of said city of Louisville, or along any street or alley, to connect with any railway bridge, transfer company, or depot, and shall

have the right, to operate or lease said connecting line or lines, and may charge a reasonable compensation for the use of the same."

On March 7, 1881, a corporation by the same name and for the same purpose was incorporated by the entering into and filing of articles of association under a general statute of the State of Indiana. The statutes of Indiana empowered a company duly incorporated to construct a railway with one or more tracks over its bridge, and the embankments pertaining thereto, and to connect the same with other railway tracks, and "to fix and alter at pleasure the rates of toll for all persons and property passing over said bridge, and railway tracks connected therewith, whether on foot, or horseback, or in vehicles of any kind, or in cars propelled by steam or any other power." It was also provided, that the company "shall have full power and authority to connect the line of railway over said bridge by continuous line of railway, in such manner and upon such route and terms as may be deemed most expedient, with any other line of railway whatever, and to maintain, use, operate, and control the said connection when completed, and charge and receive tolls for the use thereof."

The two corporations thus formed under the same name were subsequently consolidated under legislative authority which we do not understand to be questioned. On March 13, 1884, the Kentucky charter was amended, and the amendatory act provides, among other things, that the corporation "is authorized to contract with or to construct any railway or terminal line, either in Kentucky or in said State of Indiana, which may be necessary for completing its terminal facilities." Another amendatory statute, of date May 3, 1884, contained provisions, that the company "is authorized to contract with or to construct any railway of terminal line, either in Kentucky or in the State of Indiana, which may be necessary for completing its terminal facilities, and may bond the same or may indorse the bonds of any corporation or company building such line or lines, or it may extend such branch lines through the city of New Albany, State of Indiana; and it may construct such line or lines in the county of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots."

Consent of the city of Louisville, to the construction of railway tracks by the said Kentucky and Indiana Bridge Co. within its limits, was given by several ordinances, one of which, bearing date November 4, 1886, provides, that "the right herein granted is subject to the proviso that the Kentucky and Indiana Bridge Co. shall permit the use of the

said tracks by any railroad company now or hereafter desiring to use the same under reasonable conditions not inconsistent with the use thereof by the said bridge company: Provided, however, That before such company shall be entitled to such use, it shall tender to said bridge company reasonable compensation for same for one year, and shall agree to pay in each year thereafter reasonable compensation for such use: And provided further, That such railway company shall agree to and allow said Kentucky & Indiana Bridge Co. to use the tracks of such railway company within the city of Louisville upon like reasonable terms."

Consent of the city of New Albany was also given to the Kentucky & Indiana Bridge Co. "to build, construct, and maintain approaches, roadways, and embankments and trestles on, over, along, and across" certain specified streets, but without particularly designating the intended use of such approaches, roadways, etc.

On September 29, 1886, the Kentucky & Indiana Bridge Co. entered into a written contract with the Ohio & Mississippi R. Co. which contemplated the abandonment, by the last-named company, of the pre-existing contract with the Louisville Bridge Co. hereinbefore described, and the transfer of its business across the Ohio river at this point to the bridge of the Kentucky & Indiana Bridge Co. The important provisions of this last contract are the following:

"The bridge company agrees to allow the railway company to run its locomotives, cars, and trains over the Kentucky and Indiana bridge and approaches from a convenient point of connection at Vincennes street, New Albany, to the ground of the railway company at Fourteenth street in Louisville, or, should the railway company elect so to do, to a connection with the track of the Short Route Railway Transfer Co. near Thirteenth street, in Louisville; the railway company's locomotives, cars, and trains to have preference over those of a similar class of other railroad companies that may use the bridge, so far as such preference can be legally granted by the bridge company."

The bridge company is to keep its bridges, approaches, and lines of railway in repair at its own expense; it agrees "to establish, provide, and maintain tracks connecting its present tracks with the tracks of all other railroads now seeking New Albany, within a reasonable time, either directly or through the use of the other railway lines, and to switch the cars of the railway company over such connecting tracks at a switching charge of \$1 per car; also to transfer cars from the railway company's transfer yard south of Bank street, in

Louisville, to the L. & N. R. R. or the C. O. & S. W. R. R. at the same rate per car."

It is agreed that "the tolls shall be fixed at the same rate, from time to time, as the rate of the Louisville Bridge Co., and these tolls shall be paid monthly by the railway company to the bridge company, it being provided, however, that whenever the sum so collected shall exceed the sum of \$17,500 per quarter, any excess over such amount shall be paid back to the railway company, but the railway company agrees to pay to the bridge company \$17,500 per quarter, whether or not the amount of tolls so collected equals that sum; the intention being to give a fixed annual rental to the bridge company of \$70,000 per annum." But the railway company is to "endeavor with reasonable dispatch to clear itself of future liability for tolls, rental, charges, or otherwise under its present contract for the use of the Louisville bridge, and until such liability shall be removed the railway company shall not be compelled to pay any tolls hereunder to the bridge company. And the Kentucky & Indiana Bridge Co. may at its own cost, and in the name of said Ohio & Mississippi R. Co., defend against any claim of liability on the part of said O. & M. R. Co. under said contract."

"The railway company agrees . . . to carry and transport over said bridge, approaches, and railway tracks, all of its locomotives, cars, freight, passengers, mails, express matter, and everything else carried or transported by it on its own line . . . destined or consigned to or from Louisville, or to or from points which require their passage over the Ohio river at or near Louisville: Provided, however, That said railway company is at liberty, if it so desires, to perform its passenger service over any other bridge, but the rental to be paid hereunder shall not be decreased by reason thereof. The interchange of freight at Louisville and New Albany between said railway company and any connecting road shall be done over the tracks of the bridge company between the south approach to its bridge and the tracks of such connecting road, so far as the O. & M. R. Co. can lawfully control the same, and the charge for the use of such tracks shall not exceed that on any other line."

The railway company agrees, so far as it lawfully may, not to carry or transport over the said bridge, and the approaches and tracks thereto, any locomotives, cars, freight, passengers, mail and express matter between Louisville and New Albany that originates in or comes from any railroad or water line entering the one place and destined for the other, it being mutually understood and agreed between the parties hereto, that the bridge company shall have the sole exclusive right

to control, carry, and transport over the bridge, and the approaches and tracks thereto, all traffic not received from or destined to points reached over the railroad of the railway company north and east of New Albany

"The railway company agrees to furnish, at its own cost, all motive power necessary for the transfer of its locomotives, cars, freight, passengers, mail and express matter transported by it over the said bridge, and the approaches and tracks thereto."

"It is mutually agreed by the parties, that each shall be alone responsible for all loss, damage, or injury to its own locomotives, cars, machinery, and other property, as well as for all injury to its own servants, freights, and passengers which may occur while its trains are being run and managed by its own engineer, conductor, and other trainmen on the said bridge and tracks, which may be caused by the negligence of its own servants; and in all cases wherein either persons or the property of persons not parties to this agreement shall be run against or over, or thereby shall be otherwise injured by the engines or cars of either party, then in all such cases the party whose trainmen are at the time in charge of and operating such engines or cars shall alone be responsible. . . . In case of collision between the trains of the parties hereto, the party whose men or trains are at fault shall be responsible to the other party for all loss, damage, or injury sustained by it on account thereof."

The defendant company was incorporated March 5, 1850 "to construct a railroad from Louisville to the Tennessee line, in the direction of Nashville," and with usual powers of railroad companies. One provision in the charter was, that "it shall not be lawful for any other company, or any other person or persons, to travel upon or use any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof;" but the power was reserved to the State of Kentucky to incorporate thereafter other railroad companies, and it was provided, "that any and all such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated." An amendment to the charter in 1860 authorized the company to "make arrangements with other companies for through freights and passage from distant points on such terms as they may agree from time to time."

The complainant after the construction of its bridge and approaches and certain railway or terminated lines in New Albany and Louisville, claimed the right, under the provision of the charter of the defendant above referred to, to connect

the railway track of said bridge company with the track of said railroad company; and a physical connection of said tracks was made at the intersection of Seventh street and Magnolia avenue, in the city of Louisville. When this had been done, complainant claimed a right to an interchange of traffic between itself, as a common carrier, and any railroad company that might make use of its tracks, with the defendant, as a common carrier, at that point.

The defendant has in or near the city of Louisville, elsewhere than at the point of connection with the tracks of complainant, four freight yards, which, it claims, are fully adequate for the transaction of all the business of the company, whether passenger or freight. It is not satisfactorily shown that this claim is not well founded; and, for the purpose of a disposition of this case, we assume that it is. At these yards an adequate force of clerks, inspectors, porters, etc., is kept by defendant for the transaction of its business and the making of exchanges.

Previous to the filing of complaint in this case, freight was tendered in loaded cars by complainant to defendant, at the point of connection of their tracks at Seventh street and Magnolia avenue, to be transported over defendant's lines to destinations specified, and defendant refused to receive the same. The grounds of refusal, briefly stated, were the following: That complainant is not a common carrier, and therefore not entitled to demand an exchange of traffic; that the freight tendered had been taken over the bridge of complainant by a party to the contract with the Louisville Bridge Co. and in violation of the provisions of that contract; that defendant had ample facilities at its four freight yards for the exchange of traffic with connecting carriers, and was not therefore bound to afford further facilities at Seventh street and Magnolia avenue, and that in any event the party which should make demand for an exchange was not complainant, but the railway company making use of its bridge and taking freight over it. At the time of making such tender of freight, complainant was actually engaged as a common carrier in interstate traffic, as hereinafter stated.

Upon these facts, our conclusions will be briefly indicated:

First. We think the charter of complainant, as given by the Commonwealth of Kentucky, conferred the powers of a common carrier, and that such was the legislative intention. Whether the statute under which the Indiana corporation was organized had an intent equally broad may perhaps be open to question, but for the purposes of this case it is not very material. It is unquestionable that, under the consolidation, the complainant is

Bridge company a common carrier.

proprietor of a bridge and of tracks, which it lawfully operates, and which serve the purpose of a belt line in giving connection of the railroads on one side of the river with those on the other.

The power granted by the Commonwealth of Kentucky to construct and also to "operate" a line or lines of railway over the bridge and the approaches thereto, and to connect it with the lines of other parties has thus been acted on, and complainant by means thereof is engaged in interstate traffic; its passenger traffic being very considerable. It owns passenger cars and several locomotives, but no freight cars. This last fact is of no legal importance. The long lines of the country to a considerable extent lease or otherwise procure cars not owned by themselves, and if they thus procured all they used, they would none the less be common carriers and entitled to all the rights and privileges the act is intended to secure.

The chartered authority of complainant also contemplated that its bridge, approaches, and tracks would be used by other common carriers who would pay tolls or other compensation therefor. Such use by other carriers would not be inconsistent with the use by complainant as a common carrier also, but the effect would be to prolong the line of the carrier making use of the same to that extent, and thus enable it to deliver its traffic without other agency of the complainant, to such lines as could thereby be reached. By such prolongation of their lines the railroad companies reaching New Albany from the north and west may be enabled to tender traffic brought over complainant's bridge to the defendant in Louisville, and so long as by contract or otherwise any such company has the right to make use of complainant's railway and to run its locomotives and cars over the same, no connecting company to whom its traffic is offered can be heard to question the right to make use of complainant's line for the purpose. To bring the bridge and the traffic over it under the act to regulate commerce, it is only necessary that the bridge be "used or operated in connection with any railroad," as it clearly would be in case the facts were as supposed.

Second. We hold that the point of connection at Seventh street and Magnolia avenue in Louisville is a convenient and suitable point for making exchange of traffic between complainant and any carrier that may make use of its tracks, and the defendant.

On the oral argument, counsel for the defendant made a statement on this subject which is repeated in a printed brief, and as there given is as follows: "I stated, in oral argument, that a mechanical connection had been made at that point, be-

Place for making exchange of traffic.

between the terminal railway of the Kentucky & Indiana Bridge Co. and the track of the Louisville & Nashville R. Co., and that cars coming from the terminal railway of the Kentucky & Indiana Bridge Co. could be taken by the switch engines of the Louisville & Nashville R. Co. and carried to the transfer station, at Ninth and Broadway, with but little, if any, more trouble or expense than cars were taken from the private sidings, which are connected with the tracks of the Louisville & Nashville Railroad in Louisville; and I stated that I would not, therefore, consume the time of the Commission in contending that it was physically impracticable to make an interchange of traffic between the two companies at Seventh and Magnolia; nor would I attempt to make any calculation to show how much more expensive or troublesome it would be to make the transfer at Seventh and Magnolia, than it would be to make it at Ninth and Broadway. For all the purposes of my argument, I am perfectly willing to concede that Seventh and Magnolia may be regarded as a 'proper point for interchange of traffic between the Kentucky & Indiana Bridge Co. and the Louisville & Nashville R. Co.' so far as the mere trouble and expense of the interchange is concerned. I then regarded, as I now regard, that the real question at issue between the parties is, not so much as to where the interchange of traffic is to be made, as it is, as to the right of the Kentucky & Indiana Bridge Co. to demand an interchange of traffic at all."

This is a fair concession, and it states the fact as we should find it independently if no such concession were made. The defendant insists that complainant in receiving traffic from it or in delivering traffic to it is to be treated as an individual manufacturer or trader in Louisville would be; as a mere shipper, with whose charges as a bridge-owner or an owner of railway tracks the defendant has nothing to do; that complainant must therefore pay Louisville rates on freight sent or received by it, and that so far from its having any rights as a common carrier by reason of the freight it tenders having been brought over its bridge, the defendant on the other hand may refuse to receive it for that reason; at least if it comes from any company which is a party with defendant to the contract with the Louisville Bridge Co. When we decide as we do, that complainant is a common carrier, some part of this contention falls to the ground. Defendant, we think, is bound to receive traffic from it under the act to regulate commerce. The necessity to receive it at a point otherwise than at one of defendant's four yards is to some extent a hardship, but it is one that is very often found to exist and to be inevitable in the

case of the construction of a new road. The whole expenses, however, does not fall upon the old carrier. The new carrier must do its full share towards making provision for traffic exchange.

Third. The principal question in the case is the one stated by counsel qualifying the concession above made regarding the place for the exchange of traffic. And this question is not fully determined when it is held that complainant is a common carrier and entitled as such to traffic exchange. Conceding it to be a common carrier, it would still be contended on the part of the defence that the right to an exchange cannot extend to traffic offered to defendant by complainant, but which has been placed in his charge for the purpose by one of the parties to the contract with the Louisville Bridge Co. and in disregard of the provisions of that contract. This is upon the ground that defendant has a right to hold the other parties to their contract obligations, especially when it appears that a violation of those obligations would be greatly to defendant's detriment.

To determine this question we should first see what are the provisions of the act to regulate commerce which may have a bearing upon it.

The first section of the act makes the term "railroad" as used therein include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease. There can be no question, therefore, that the traffic carried on by common carriers over the bridge and tracks of complainant is under the regulation of the act, whether complainant is the carrier or some railroad company making use of its property for the purpose.

The third section of the act provides that "every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith; and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The interchange of traffic here mentioned obviously does not mean mere local traffic. The act does not mean that

Right of
Bridge Co. to
demand inter-
change of traf-
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Provisions of
act bearing
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tion.

the carriers regulated by it shall receive from each other, as shippers merely, the freight that may be offered, but it has in view traffic that has been taken up by one carrier and which at some point on its line is to be delivered to another. Such traffic is through traffic in the sense that it is to pass on or over more than one line. It is not mere local traffic that is taken up at one station of a carrier to be delivered at another of its stations. It is in respect to such through traffic that the act undertakes to compel the affording of "all reasonable, proper, and equal facilities." A carrier very obviously does not do this when it refuses to receive traffic from a connecting carrier otherwise than as from a shipper.

"Interchange of traffic" does not mean mere local traffic.

The question of the right of an interstate carrier to stand independently; to unite in no through rates, and to do no through billing, cannot be raised by this defendant in this case, for the very plain reason that it does not claim such a right and in its dealings with other carriers act upon it. It makes through rates with the roads north of the Ohio river upon traffic to pass over its lines, and it gives through bills therefor. What it insists upon in this case is that it has a right to do this with some carriers and to refuse to do it with others. The claim of the defence is plainly stated in the brief of counsel as follows:

Claim of the defence.

"The L. & N. R. Co. is and has been at all times perfectly willing to deliver and receive to and from all railroad companies engaged in the transportation of freights to and from points north of New Albany, Jeffersonville, and Louisville, and upon the usual through rates, provided such freights are transported by said railroad companies across the Ohio river at Louisville upon the Louisville bridge. The L. & N. R. Co. will give no preference or advantage whatever to either one of those railroad companies over the other, provided they will all bring their freight across the river upon the Louisville bridge. But if instead of using that bridge, they or any of them see proper to abandon it, and carry the freight across the river upon the K. & I. bridge, or any other bridge that may be built at or near Louisville, then the L. & N. R. Co. will decline to make through rates or through routes with such companies, and will insist upon treating them as Louisville customers, and charge them Louisville rates. It is for those railroad companies to say for themselves whether they will have the same through routes and through rates as the J. M. & I. R. Co. or not. If they will use the same bridge they shall enjoy the same through routes and the same through rates. But if they pre-

- fer to use the K. & I. bridge, or any other bridge at Louisville, thinking that it will be to their advantage to do so, they must take the consequences. But the preference or advantage which may arise in that event will not be one which is made or given by the L. & N. R. Co., but it will be one which the railroad companies themselves may see proper to make. They have a free choice of route, and must abide the result of their choice."

This is the position of defendant, very plainly stated. For taking it at all the defendant assigns its equities under the contract with the Louisville Bridge Co., and these are apparently very strong. It is also claimed that there are no reasons of a public nature for compelling it to receive traffic brought over complainant's bridge. The traffic of the Ohio and Mississippi R. Co. it says is fully as well and even more cheaply accommodated by the old bridge than by the new, and a number of English cases are cited to the point that in considering questions of undue preference, courts require it to "be clearly shown that the cause complained of occasioned inconveniences to the public, and regard must be had to the general convenience of the public rather than to the wishes or interests of individual job masters." *Ilfracombe Co. v. L. & S. W. Railway*, 1 Nev. & Mac., 61; *Beadell v. Eastern Counties Railway*, *ibid.*, 56; *Ransom v. Eastern Counties Railway*, *ibid.*, 112; *Caterham R. Co. v. Brighton, etc., R. Co.*, *ibid.*, 37; *Barrett v. G. N., etc., R. Co.*, *ibid.*, 43, 44; *Painter v. L. B. & S. C. Co. R. Co.*, *ibid.*, 58.

To enable us to determine whether these English cases are fairly applicable to cases arising under the act to regulate commerce, it might be necessary to examine the reasoning made use of in them in the light of the statute. But we do not think this important now, because if the principle here stated were admitted to be applicable in the United States, it would not in this case aid the defendant.

The point is not raised here by any "job master," but it is raised by a common carrier; by one of the class to which the act to regulate commerce requires the defendant to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their respective lines, and those connecting therewith." Defendant refuses to afford complainant any such facilities whatever, and replies to its demand for them that traffic is sufficiently accommodated without, and the public has therefore no interest in the demand being acceded

Defence that traffic is accommodated without interchange of facilities.

to. This seems to be equivalent to saying that on public grounds there is no reason for the existence of complainant's bridge and tracks, and other carriers may ignore their existence altogether. The same principle, if accepted as sound, would justify the refusal to exchange traffic with any railroad company whose lines, long or short, could not be shown to have been built in response to some public demand. The New York, Lake Erie and Western R. Co., for example, might refuse to exchange freight with the New York, Chicago and St. Louis, and justify its refusal on proof that the road of the last-mentioned company was wholly unnecessary, the traffic which it now carries having been sufficiently accommodated by other lines before it was constructed.

Such a contention cannot be supported. All railroads in existence which are created under legislative authority must be conclusively presumed for all the purposes of the act to regulate commerce, to be of public convenience. The fact that they are so is settled by the construction itself and the legislative or other proper public authority that was given therefor. Defendant cannot therefore refuse to exchange traffic with complainant, or with others making use of its tracks on any such ground as here suggested.

Contention unsupported.

Some reliance is also placed by the defence upon the case of *Atchison, Topeka & Santa Fé R. Co. v. Denver & New Orleans R. Co.*, 110 U. S., 677; s. c., 16 Am. & Eng. R. R. Cas. 57, in which it was decided that a provision in the constitution of Colorado that "all individuals, associations, or corporations shall have equal right to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State," did not compel a railroad company which had given through routes and through rates to one railroad company to give them to its rival also. But the provision in the constitution of Colorado is very much less broad than that in the act to regulate commerce; the requirement to afford "equal" facilities is not the same as the prohibition of "undue or unreasonable discrimination" in facilities; and when all the terms above quoted from the third section of the act are considered together, it is plain, we think, that a carrier does not comply with the requirement to afford facilities without some active co-operation on its part in the receiving, forwarding, and delivering; and that a co-operation cannot be "equal" if it is restricted to one carrier or to less than all.

Denver, etc., R. Co. v. Atchison, etc., R. Co. examined.

In its reliance upon its contract with the Louisville Bridge

Company the defendant suggests the question of the constitutional power of Congress to pass any act which would invalidate the contract; and though counsel do not argue the question they insist that as a matter of construction the act to regulate commerce should be given effect in such a way as to leave that contract in full force. To this point the language of Chief Justice Cockburn in *South Eastern R. Co. v. Railway Commissioners*, L. R. 5 Q. B. Div., 231, is quoted. In this case the chief justice said:

**Constitution-
ality of act—
impairment of
contract.**

“It seems to me next to impossible to suppose that Parliament, ever disposed to deal tenderly with vested rights, having conceded these powers and rights, as the basis of these great undertakings, could intend by a single blow to place these companies in a worse position than that of private ones. Having once made its bargain with a public company in a matter of commercial enterprise in the act by which the company is constituted and its powers conferred, the legislature could not, unless such a power has been expressly reserved to it, with any consistency of justice, afterwards impose fresh obligations upon the company, or deprive it of any of the powers and vested rights, the grant of which had been the inducement to undertake the enterprise.”

Again the same learned judge says in the same case:

“I cannot but think beyond question that interference with the self-government and financial management of railway companies once constituted and established would be an interference with vested rights. It seems to me to follow, that while there can be no doubt that Parliament in the plenitude of its legislative power can deal with such rights, yet that, looking to the tenderness with which vested rights are ever infringed on, any legislative enactment in any way interfering with such rights must receive the strictest construction and be carried no further than the language of the enactment necessarily requires.”

In support of the same doctrine *Nicholson v. Great Western R. Co.*, 1 Nev. and Mac. 150, is also cited by the defence.

The doctrine thus stated is not likely to encounter much dissent in the United States. In so far as it expresses a rule of right and justice it corresponds to the construction which the Federal Supreme Court in *Dartmouth College v. Woodward*, 4 Wheat., 519, gave to the provision in the Federal Constitution inhibiting the States from passing laws impairing the obligation of contracts. Whether the power of Congress is limited in this regard as the legislative power of the States is, is a question that is sometimes mooted, but the

**Power of Con-
gress—Act to
regulate com-
merce as af-
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tracts.**

discussion of which we shall not enter upon. If it were conceded that Congress cannot by its legislation impair the obligation of contracts, the concession would in no respect affect the pending controversy.

The slightest examination of the act to regulate commerce will make it evident that Congress has not undertaken thereby to meddle with contracts or to affect them in any way, except as they may incidentally be affected by the rules it lays down and the regulations it prescribes. Those rules and regulations are in the nature of police laws. They are prescribed that facilities created for the public benefit may not be abused; that right may be done and public conveniences of a certain class made as useful as possible. It is not one of the purposes of Congress that contracts shall be abrogated; much less that the obligation of this particular contract now brought to our attention, and which the act in no way refers to, shall in any particular be impaired or interfered with.

But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. This is the case with State laws, as well as with Federal. There probably was never an act passed in restraint of the sale of intoxicating drinks that did not affect some contracts, and render their literal enforcement impossible. The same may be said of the Federal revenue laws. Nothing is more likely than that a considerable change in customs regulations or customs duties, or in the provisions made for enforcement of excise laws will deprive some party of a right he supposed he had secured by contract. But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the Legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable.

But it does not follow that when we hold that defendant is bound to receive traffic offered to it by complainant, notwithstanding it may have come to it from the Ohio & Mississippi R. Co., that thereby the contract between that company and the defendant is abrogated or its obligation impaired. On the contrary, if that contract was legal in its inception, and may be lawfully performed by the Ohio & Mississippi R. Co., notwithstanding any provision contained in the act to regulate commerce, then requiring defendant to receive

Effect of decision of contract with Ohio & Miss. R. Co.

such traffic from complainant or even from the Ohio & Mississippi R. Co. at the point of connection of the lines of complainant and defendant when tendered by the one or the other will not take from defendant the customary remedy for any breach of the contract. What we decide in this case is, that when the traffic is offered to defendant at the point of connection aforesaid, it is not at liberty, in view of the strong and positive requirements of the act to regulate commerce, to take redress in its own hands, and if it finds that the traffic is affected by a previous breach of contract, then instead of affording "equal" facilities for it as required by the act, to refuse to afford any facilities. This is not the proper mode for obtaining redress in case of even unquestionably legal contracts; the law prescribes judicial remedies for a breach which are supposed to be adequate, and to those remedies the party should resort. No order in this case will preclude it.

Fourth. Defendant further insists that for the purposes of through business there must be through rates, and that no carrier is under obligation to make through rates except on a consideration of its own interest; joint rates being purely a matter of agreement. On the other hand complainant contends that the same rates the defendant makes with one carrier it must make with others. This contention was advanced, as we understood it, with special reference to the business of the Ohio & Mississippi R. Co.

In the case before us there is nothing to justify any discussion of rates. No company is before us asking rates of defendant. The Ohio & Mississippi R. Co. is not here as a party, and we cannot know what it desires. We cannot even know that it considers the rates now made by the defendant with other carriers reasonable, or that it would be satisfied to accept them for itself. When that company comes here with a complaint we shall deal with it on the circumstances and equities of the case as they are then made to appear. The only complainant now here is the Kentucky & Indiana Bridge Co. On its complaint that defendant refuses to receive traffic from it as a common carrier, we hold that in our opinion defendant is obliged to receive it, and to afford such equal facilities for the traffic as it affords to other carriers. We also hold as necessarily or at least properly within the issue, that defendant cannot lawfully base a refusal as to any part of the traffic on the ground that it is brought to it in violation of contract. The decision in favor of complainant on the ground of its being a common carrier, necessarily announces a general principle of which other carriers making use of its bridge and tracks may of right avail themselves.

No question of through rates with reference to Ohio & M. Co. arises.

It is undoubtedly true as defendant contends, that through business requires through billing, and is more conveniently done under joint rates. And joint rates are made by consent. On this subject we say in this case only, that in view of the provision in the third section of the act that common carriers shall not discriminate in their rates and charges between connecting lines, it is not so clear to us as it seems to be to defendant's counsel, that a carrier may make joint rates with one railroad company engaged in a certain traffic and refuse to make such as, under the circumstances, would be equally reasonable with that company's rival. When a question of that sort comes before us, we shall endeavor to decide it as the law and the circumstances of the particular case may be found to require. But we shall assume, with the general right decided as above, that the parties will dispose of other questions without further invoking our aid.

The question of the validity of the contract between complainant and the Ohio & Mississippi R. Co., or of any of its provisions, is not involved in this case, and no opinion is expressed upon it. The case is disposed of as it would be if no such contract were in existence.

Order will be entered sustaining the complaint and directing the defendant to cease and desist from refusing to receive the interstate traffic offered to it by complainant at the point of connection of the roads of the parties respectively, at Seventh street and Magnolia avenue in the city of Louisville, and instead thereof to afford all reasonable proper and equal facilities for the interchange of interstate traffic between the respective lines of the parties, and for the receiving, forwarding and delivering of property to and from the respective lines and those connected therewith. Order of the commission.

Commissioner Schoonmaker files a separate opinion.

Commissioner Bragg, for personal reasons, did not participate in the decision of this case.

DISSENTING REPORT AND OPINION.

SCHOONMAKER, C.—The petitioner, after setting forth its incorporation, the construction of its bridge across the Ohio river between Louisville, Kentucky, and New Albany, Indiana, its track connections with railroad lines on both sides of the river, the business in which it is engaged, and other incidental matters, alleges as the ground of complaint that, in violation of law and of the act to regulate commerce, the defendant, in combination and conspiracy with the Louisville Bridge Averments in petition.

Co., a corporation owing the only other bridge across said Ohio river between Louisville and New Albany, and with other railroad companies interested in said last-named bridge, and for the purpose of preventing the transfer of freight over petitioner's bridge, and compelling railway transportation of freight across the Ohio river at Louisville to be made over the bridge of the Louisville Bridge Co., has refused and now refuses to further interchange traffic between the railways of said petitioner and said defendant, or to receive from petitioner or the railway companies using petitioner's tracks at said point of connection, cars of freight tendered to defendant for transportation over its railway to points thereon and beyond and *via* said railroad, or to deliver to the petitioner or any railroad company using its said tracks, freight arriving at defendant's said railway at Louisville for or consigned to points on petitioner's railway or any railroad connecting therewith at New Albany, although the defendant affords such facilities for interchange of traffic to said Louisville Bridge Co.; and the petitioner prays that the Louisville & Nashville R. Co. be required by order of the Commission to interchange traffic with petitioner, and with the railway companies using the petitioner's railroad at the point of connection made by the petitioner with the defendant, at Seventh street and Magnolia avenue, in Louisville, and to receive from petitioner and the railway companies using its railroad, all freight tendered by it or them to the defendant for transportation to points on or beyond or *via* its railroad or railroads, and to deliver to the petitioner and to the railway companies using petitioner's railroad at said point of connection, all freight arriving at Louisville over defendant's railroad, and consigned to petitioner or to said railway companies using petitioner's railroad, or to points on the line of petitioner's railroad, or the railroads of the railway companies using its tracks.

The answer of the defendant denies that it is within either the corporate or physical power of the petitioner or the defendant to exchange cars or freight or other traffic between said railways at the point of connection at Seventh street and Magnolia avenue, for the reason that there are no depots, platforms, buildings or other suitable facilities at that point, and because there are no clerks, agents, car inspectors, repairers, or other employees at that point to attend to the business of such interchanges; and denies that it would be reasonable or proper to require the defendant to interchange at that point, because the defendant has ample facilities at its four other yards established in the city of Louisville, to handle all of the freight traffic at that

Defendant's
answer.

point; and it would be improper and unreasonable to require the defendant to go to further expense in the way of employees or terminal facilities to handle the business which the petitioner desires the defendant to handle at that particular point; and defendant therefore claims that it is justified in refusing to interchange traffic with the petitioner or the carriers that use the bridge of the petitioner, at the point of connection at Seventh street and Magnolia avenue, and denies that either in the interchange of traffic which crosses the bridge of the Louisville Bridge Co., or in refusing to interchange the traffic which crosses the petitioner's bridge, the defendant has been acting or is acting in violation of law, or in combination and conspiracy with the Louisville Bridge Co., or with any other railroad companies interested in that bridge.

The petitioner, the Kentucky & Indiana Bridge Co., was incorporated by an act of the Legislature of the State of Kentucky, approved April 1, 1880. By this act the company was empowered to locate, build, construct, and maintain, under the laws of the United States, a bridge for **Facts found.** railway, wagon, street railway, and all other purposes, between the cities of Louisville, Kentucky, and New Albany, in the State of Indiana, from any convenient and accessible point in Louisville, or within one mile thereof to any point in New Albany or within one mile thereof, and the company was clothed with all the powers, privileges, rights, and franchises necessary for carrying out the purposes named in the act, together with the power to purchase, lease, or condemn all the real estate that might be necessary for the purposes of the corporation, whether for piers, approaches, tracks, tollhouses, or approaches leading to the same. The corporation is also given power to lay upon the said bridge a single or double track for railroad cars, or street cars, or for wagons or other vehicles, and all animals, and to erect footways for passengers, and charge for the use thereof reasonable tolls, and for the said purpose to erect, on either or both sides of said bridge, toll gates, and to do all other acts or things necessary for collecting the charges for the use of the bridge; and also to run any line or railways through the city of Louisville, on such terms as might be prescribed by ordinance of the city of Louisville, or along any street or alley, to connect with any railway bridge transfer company or depot, and was given the right to operate or lease said connecting line or lines, and to charge a reasonable compensation for the use of the same. It is also empowered to "contract with any railroad company for the use of said bridge by its cars or engines, or for other purposes." Any railroad company, street railway or person or municipal corporation, in or out of the city of Louisville,

is authorized to subscribe for its capital stock upon any terms or conditions agreed upon; and it is empowered to "make such contracts or agreements as may be deemed expedient for the use, management, or control of such bridge." A like company was organized under the general laws of the State of Indiana, and, pursuant to statutory provisions, the two companies were duly consolidated at a subsequent period.

By an act of the Kentucky Legislature, approved March 13, 1884, the bridge company was authorized to contract with, or to construct, any railway or terminal line, either in Kentucky or in the State of Indiana, which may be necessary for completing its terminal facilities, and to extend such branch lines through the city of New Albany, in Indiana; and, by a later act, it was also authorized to construct such line or lines in the county of Jefferson, State of Kentucky, as might be necessary to complete the connection with other railways or depots.

By another act, approved May 3, 1884, the bridge company was further authorized to connect its line with the line of the Short Route Transfer Co., and for that purpose to cross other railway or bridge lines, passing either under or over the same, and to cross the land of other railway or bridge companies, in case it might be necessary in running its connecting lines.

Under these powers the company constructed its bridge, and the construction was completed in 1886. The bridge forms a connection for railway transportation and for the passage of carriages between the cities of Louisville, Kentucky, and New Albany, Indiana. The company, under its powers, has constructed about ten miles of railroad tracks in the city of Louisville, and it has two modes of connection in Louisville with the defendant—one at the Louisville depot, over what is known as the Short Route railway, and another by a line running around the town about six miles to connect which the Southwestern road and the Louisville & Nashville railroad. The only track connection of the petitioner with the defendant's road is at Seventh street and Magnolia avenue, and that is in part over the private switching-tracks of a Louisville shipper, which the petitioner has acquired the right to use.

By the statutes of Indiana, the bridge company was authorized to construct a railway, with one or more tracks, from said bridge, and the embankments appertaining thereto, and to connect the same with other railway tracks, and to fix the rates of toll for all persons and property passing over said bridge, and railway tracks connected therewith, whether on foot or horseback, or in vehicles of any kind, or in cars propelled by steam or any other power; also to connect the line of railway over said bridge by continuous line of railway, in such manner and upon such route and terms as may be deemed

most expedient, with any other line of railway whatever, and to maintain, use, operate, and control the said connection, when completed, and charge and receive tolls for the use thereof.

On the 29th day of September, 1886, an agreement under seal was entered into between the petitioner, the Kentucky & Indiana Bridge Co., and the Ohio & Mississippi R. Co., a corporation organized under the laws of Ohio, Indiana, and Illinois, by which, among other things, it was agreed as follows:

First. The bridge company agrees to allow the railway company to run its locomotives, cars, and trains over the Kentucky and Indiana bridge and approaches, from a convenient point of connection in Vincennes street, New Albany, to the ground of the railway company at Fourteenth street, in Louisville, or, should the railway company elect so to do, to a connection with the track of the Short Route Railway Transfer Co., near Thirteenth street, in Louisville, the railway company's locomotives, cars and trains to have preference over those of a similar class of other railroad companies that may use the bridge, so far as such preference can be legally granted by the bridge company.

Third. The bridge company agrees to allow the railway company, without charge, to lay, maintain, and use such transfer tracks as it may require on the ground of the bridge company between Bank and Main streets on the connecting line of the bridge company, the amount of ground so occupied not to exceed seven acres, and to be of suitable and convenient shape.

Fourth. The bridge company agrees to establish, provide, and maintain tracks connecting its present tracks with the tracks of all other railroads now entering New Albany, within a reasonable time, either directly or through the use of other railway lines, and to switch the cars of the railway company over such connecting tracks at a switching charge of \$1 per car; and also transfer cars from the railway company's transfer yard south of Bank street, in Louisville, to the Louisville & Nashville railroad, or the Chesapeake, Ohio & Southwestern railroad at the same rate per car.

Sixth. The tolls shall be fixed at the same rate from time to time as the rate of the Louisville Bridge Co., and these tolls shall be paid monthly by the railway company to the bridge company, it being provided, however, that, whenever the sum so collected shall exceed the sum of \$17,500 per quarter, any excess over such amount shall be paid back to the railway company, but the railway company agrees to pay to the bridge company \$17,500 per quarter whether or not

the amount of tolls so collected equals that sum; the intention being to give a fixed annual rental to the bridge company of \$70,000 per annum.

Seventh. The railway company shall endeavor, with reasonable dispatch, to clear itself of future liability for tolls, rentals, charges, or otherwise under its present contract for the use of the Louisville bridge, and, until such liability shall be removed, the railway company shall not be compelled to pay any tolls hereunder to the bridge company.

And said Kentucky & Indiana Bridge Co. may, at its own cost and in the name of said Ohio & Mississippi R. Co., defend against any claim of liability on the part of said Ohio & Mississippi R. Co. under said contract.

Eighth. The railway company agrees during the existence of this agreement to carry and transport over said bridge, approaches, and railway tracks, all of its locomotives, cars, freight, passengers, mails, express matter, and everything else carried or transported by it on its own line of railroad aforesaid which it may carry or transport destined or consigned to or from Louisville and to or from points which require their passage over the Ohio river at or near Louisville. Provided, however, that said railway company is at liberty, if it so desires, to perform its passenger service over any other bridge, but the rental to be paid hereunder shall not be decreased by reason thereof. The interchange of freight business at Louisville and New Albany, between said railway company and any connecting road, shall be done over the tracks of the bridge company between the south approach to its bridge and the tracks of such connecting road, so far as the Ohio & Mississippi R. Co. can lawfully control the same, and the charge for the use of such tracks shall not exceed that on any other line.

Ninth. The railway company agrees, so far, at it lawfully may, not to carry or transport over the said bridge, and the approaches and tracks thereto, any locomotives, cars, freight, passengers, mail and express matter between Louisville and New Albany that originates in or comes from any railroad or water line entering the one place and destined for the other, it being mutually understood and agreed between the parties hereto that the bridge company shall have the sole and exclusive right to control, carry, and transport over the bridge, and the approaches and tracks thereto, all traffic not received from or destined to points reached over the railroad of the railway company north and east of New Albany.

Tenth. The railway company agrees to furnish, at its own cost, all motive power necessary for the transfer of its locomotives, cars, freight, passengers, mail and express matter

transported by it over the said bridge, and the approaches and tracks thereto.

There are four railroads which enter Louisville from the north side of the Ohio river—the Jeffersonville, Madison & Indianapolis railroad, the Ohio & Mississippi railroad, the Louisville, Evansville & St. Louis railroad, and the Chesapeake, Ohio & Southwestern railroad. Until a recent date, all these railroads used the Louisville bridge to reach the city of Louisville with their cars. Recently the Ohio & Mississippi railroad has used the bridge of the petitioner under the contract before mentioned. The only independent connection over the tracks of the bridge company, with the road of the defendant, is by a somewhat circuitous route of about six miles to the junction of tracks formed at Seventh street and Magnolia avenue. It was claimed by the petitioner, and testimony was given to show, that it was not practicable for it to make a connection with the defendant at any other point.

Interchanges of business between the defendant and the petitioner, or the Ohio & Mississippi railroad, using the bridge and tracks of the petitioner to some extent and for a limited time, have taken place at Seventh street and Magnolia avenue, but no agreement for interchange of business at that point has ever been made.

Some discussion upon the subject ensued between the petitioner and the defendant, the result of which was that the defendant refused further interchanges at that point, and insisted on its right to refuse until the time of the hearing. On the hearing it announced itself willing to interchange at Louisville rates, and to that extent waived its objections.

The Louisville & Nashville R. Co. was incorporated by the Legislature of Kentucky in 1850, and was given power to construct a railroad from Louisville to the Tennessee line in the direction of Nashville. Its line has since been extended, by consolidations, leases, purchases, and traffic arrangements, to several points in the south, including Nashville, Mobile, and New Orleans. The charter provides that it shall not be lawful for any other company or any other person or persons to travel upon or use any of the roads of said company, or to transfer persons or property thereon, without the license and permission of the president and directors thereof; but the power was reserved to the State of Kentucky to incorporate thereafter other railroad companies, and it was provided that any and all of such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated. By an amendment to the charter, made in 1860, the company was authorized to make arrangements with other companies

for through freights and passage from distant points, on such terms as they may agree from time to time.

The Louisville & Nashville R. Co. has four freight yards in and near Louisville. The first, known as the First and Water street yard, begins at First and Water streets in said city, and extends, with various sidings as far east as Preston street in said city, a distance of about 2000 feet. The second yard, known as the East Louisville yard, begins at what would be Main street extended in Louisville, and runs southwardly and westwardly to a point near Baxter avenue, a distance of from 2000 to 3000 feet. This yard is between one and a half miles distant from the first yard. These two yards are used principally for handling freights coming from or going to points on the Cincinnati division of the defendant's road and points beyond that division. The third yard, known as the South Louisville yard, is at the junction of the Louisville Railway Transfer Co.'s tracks with the main line of the defendant, and is 2000 or 3000 feet long; this yard is distant from the second yard about four or five miles. At this point all cars intended for the Cincinnati and Lexington division are taken out of defendant's trains, and those for Louisville proper and to go north of the Ohio river are taken to the fourth yard. The fourth yard, known as the Ninth and Broadway yard, extends from Broadway south to Oldham street, and from Ninth to Tenth streets. It is about three miles distant from the South Louisville yard. The main or principal yard is located at Ninth street and Broadway, where the traffic crossing the Ohio river at Louisville is interchanged with the various railroads leading north from Louisville, and where local freight received from the south destined to Louisville, or received at Louisville destined to points south, is handled. At the first, second, and fourth yards above mentioned, the defendant has depot buildings, platforms, and other adequate facilities, and clerks, inspectors, repairers, etc., for receiving, delivering, transferring, and handling cars and freights. At the third, or South Louisville yard, it has a passenger platform, but no facilities for handling freights except to switch them in car-load lots. The defendant has switch engines, which, under certain regulations, run between the third and fourth yards above mentioned, passing by the point of connection with the petitioner's railway at Seventh street and Magnolia avenue. The connection between the petitioner's railway and the defendant's railway at Seventh street and Magnolia avenue, has been constructed so that cars can be switched from one railway to the other, and the connection affords a practicable means of interchanging freight cars and freight business between the

petitioner and the defendant, or between the defendant and the railway companies using the bridge and railway of the petitioner. But interchanges of freight at that junction can only be conveniently be made in car-loads. Freight in broken lots or less than car loads requires to be hauled about a mile to the Tenth street depot to be inspected for interchange.

Neither the petitioner nor the defendant has any buildings, platforms, or other structures for the interchange of traffic at the point where the petitioner's connection with the defendant has been made.

The petitioner does some business as a carrier between Louisville and New Albany, and it bills through freight from sidings on its line to go to any point on any other connecting line. There are five sidings of the petitioner in Louisville. The cars supplied by the petitioner to shippers are obtained by ordering them from other companies for whose lines the freight is destined. That is the only way cars are furnished for freight destined beyond Louisville or New Albany. The petitioner has five engines and ten passenger cars, but no freight cars. The petitioner pays the freight charges to the lines from which cars are ordered. Its own charges are for the bridge tolls and its terminal service. The bridge toll varies according to the classification of the freight, from one and one-quarter to six cents per hundred. The switching charge in Louisville for moving freight from the Ohio & Mississippi road on the tracts of the petitioner to the defendant's road varies from one to three dollars per car. The petitioner makes no charge on freight that crosses its bridge except the bridge toll and the switching charge.

The Louisville Bridge Co. was incorporated by the State of Kentucky March 10, 1856. By an amendment to the charter made in 1862 the bridge company was authorized to contract with any railroad company incorporated under the laws of the State of Kentucky or any other State of the United States to warrant the annual profits of the bridge to be built by said company to be equal to the keeping the bridge in repair, and of its operation, and that the net earnings should be equal to 6 per cent on a cost of one million dollars. It was further authorized to contract at any agreed sum or rate with any railroad company chartered by the State of Kentucky or any other State of the United States, for the annual use of said bridge by the cars, or for the purpose of said railroad company; and any railroad company incorporated by the State of Kentucky was authorized to subscribe to the stock or make the guarantees and agreements authorized by the preceding sections of the act, when authorized by the stockholders at some general meeting.

The bridge was declared to be a lawful structure by an act of Congress, approved July 14th, 1862. By an act of Congress, approved February 17, 1865, the act of July 14, 1862, was so amended as to authorize the Louisville & Nashville R. Co., and the Jeffersonville R. Co. (stockholders in the Louisville Bridge Co.), to construct a railroad bridge over the Ohio river at the head of the Falls of the Ohio, subject to all the provisions of said act, and the bridge so to be constructed was declared to be a lawful structure.

Under these acts of legislation the capital stock of the Louisville Bridge Co. was subscribed for by the Jeffersonville, Madison and Indianapolis R. Co., the Louisville & Nashville R. Co., and certain other corporations and individuals, the subscription of the Louisville & Nashville R. Co. being \$300,000.

On June 5th, 1872, a written contract was entered into between the Louisville Bridge Co., of the first part, the Jeffersonville, Madison & Indianapolis R. Co., of the second part, the Ohio & Mississippi R. Co., of the third part, and the Louisville & Nashville R. Co., of the fourth part, in which it was recited that the capital stock of the bridge company was fifteen hundred thousand dollars, that its mortgage debt was eight hundred thousand dollars, evidenced by bonds to mature December 1st, 1888, bearing interest at seven per cent, payable semi-annually. The contract so entered into provided among other things, that the second, third, and fourth parties agree to use the bridge as covenanted in the contract. It was covenanted that the tolls and charges over and for the use of said bridge and its tracks, owned by the first party, in the transportation of freight, passengers, mails, and other goods received from or delivered to the roads of said second, third, and fourth parties, per ton and per passenger, or per car, engine, or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce, in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge, and paying a dividend semi-annually of six per cent on the capital stock of fifteen hundred thousand dollars, the interest upon the bonds as the same shall become payable, a sinking fund sufficient to pay off the bonds of eight hundred thousand dollars at maturity, the amount necessary to keep up the corporate organization of the first party, with its proper officers and servants, and such taxes as may be chargeable against the bridge company on said bridge or other property appertaining thereto or otherwise. And it was further provided that the charges and tolls shall, from year to year, be reduced in proportion to the reduction of in-

terest on the bonds, by the operation of said sinking fund, and the tolls and charges should always be the same to each of the second, third, and fourth parties; that the tolls and charges to other railroads or railroad companies, for like use of the bridge and the approach owned by the first party, shall not be less than those charged to or incurred by the parties to the contract; that all such tolls and charges paid by other railroads or railroad companies, shall be applied to and form a part of the fund provided for the payment of expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties to the contract.

Each of the railroad companies parties to the contract agreed that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on or over their roads to and from Louisville, and to and from points which require their passage over the Ohio river at or near Louisville, during the existence of the agreement.

The fourth party, the Louisville & Nashville R. Co., covenanted with each of the other parties to deliver to the party of the first part, the Louisville Bridge Co., to be passed over said bridge, or the parties of the second or third parts, or to such other railroad company or companies as may, for the time being, be transporting freight, passengers, mails, express matter, and other goods over the bridge, all the freight, passengers, mails, express matter, and other goods carried on or over its roads, or any part thereof, destined for Jeffersonville, in the State of Indiana, or any other points which require their passage over the Ohio river at or near Louisville, during the existence of the agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of tolls and charges provided for the use of said bridge and approaches, and punctually pay the said tolls and charge to the first party.

The approach to said bridge at the north end thereof was owned by the second party, the Jeffersonville, Madison & Indianapolis R. Co., and the third party, the Ohio & Mississippi R. Co., agreed with the second party to use said approach to said bridge in going into and over said bridge, and it was agreed between said second and third parties that all the trains, cars, and engines passing over said approach, and over said bridge, shall be under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains, cars, and engines, of the second party, in the premises, shall be equally applicable to the trains, cars, and engines of the third party, each being dealt with alike. And the second party covenanted to furnish all need-

ful and sufficient engines for the service so provided for, and at all times to transfer with the same promptness and care over said bridge the trains, cars, engines, and traffic of the parties of the third and fourth parts that it does the trains, cars, engines, and traffic received from or to be delivered to its own road, the intention being that each of the parties shall enjoy equal facilities over said approach and bridge.

A reasonable compensation is provided for, to be paid to the said party of the second part, for the service so to be rendered, and to be apportioned between the parties to the contract in proportion to the service to each, per ton, and per passenger, or per car, engine, or other means of transportation.

It is further provided that the contract shall continue in force and operation until it shall be terminated by some one of the parties thereto, giving notice in writing, to the other parties, of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of which two years the same shall terminate as to all the parties thereto included in such notice.

It was shown by the testimony that the rates of tolls and charges upon said bridge have decreased per ton and per passenger, as the volume of the traffic over the bridge has increased. Since the contract was entered into the Louisville, New Albany & Chicago R. Co., and the Louisville, Evansville & St. Louis R. Co., have been allowed to use said bridge and its approaches in substantial accordance with the provisions of the contract. It was also shown by the testimony that some years ago an arrangement was made whereby the dividends agreed to be paid upon the capital stock of the bridge company, were reduced from 6 to 4 per cent semi-annually, and that the sinking fund provided for by the contract is now sufficient to pay off the bonds, and that they will be paid when they mature, in December, 1888.

The indebtedness of the Kentucky & Indiana Bridge Co., the petitioner, is one million dollars, represented by 5 per cent bonds, on the bridge, and four hundred thousand dollars upon the belt road, represented by 5 per cent bonds. The capital stock of the petitioner is one million seven hundred thousand dollars. The petitioner bought the required embankment and right of way leading from New Albany in the direction of Water street and gave it to the Ohio & Mississippi R. Co. as an inducement for that company to build to the bridge of the petitioner. On the 4th of February, 1888, the superintendent of the Ohio & Mississippi R. Co. gave notice to the Louisville Bridge Co. that at twelve o'clock noon of that day that railroad company would cease to use

the bridge of the Louisville Bridge Co., and that the engines of the bridge company must not go into the yard of the Ohio & Mississippi R. Co.

In November, 1887, the charge for switching by the Louisville Bridge Co. was discontinued, and a circular was issued that until further notice no charge will be made for switching to or from its bridge loaded cars passing over said bridge and paying established tolls, but that the usual charge will be made for switching loaded cars that do not pass over the bridge.

Neither the Louisville Bridge Co. nor the Kentucky & Indiana Bridge Co. is a member of any of the associations that fix rates from points north of the Ohio river and Louisville to points south of Louisville. The Louisville R. Co. does not own or operate any line of railroad north of the Ohio river. Through rates from points north of the Ohio river to points south of the Ohio river are made by agreement of the roads north of the river and those south of the river upon terms and conditions assented to by the companies making such rates, and through bills of lading are issued pursuant to such agreements. There are many points north of the Ohio river, and there are many points south of the Ohio river, to which through bills of lading are not issued, and through rates not made.

The defendant company has arrangements with the four roads entering Louisville from the north side of the Ohio river by the Louisville bridge for interchanging freight traffic, upon terms and conditions agreed upon between them, and the defendant refuses to receive freights from those roads excepting upon the terms and conditions agreed upon. If those roads bring freight to Louisville in violation of the agreements, the defendant company refuses to receive and transport such freight, except as a local Louisville shipper, and the freight so received is treated the same as freight tendered for shipment by Louisville shippers.

The defendant company has no arrangements for interchange of traffic with the Kentucky & Indiana Bridge Co., and therefore refused, at the time this proceeding was commenced, to receive freight from that company, unless delivered to the defendant at its various freight stations, where it offered to receive the freight, issue bills of lading, and contract for its transportation upon the same terms and conditions it received like kinds of freight from the Louisville shippers; and its agents were instructed to only receive freight and deliver property to the Kentucky & Indiana Bridge Co. at its regular freight stations in Louisville on the same terms and conditions that the Louisville ship-

pers receive and deliver freight. This position was withdrawn on the hearing and the defendant admitted that so far as any additional expense and trouble were concerned the junction of Seventh Street and Magnolia avenue might be regarded as a suitable place for receiving and delivering freight cars.

The petitioner in this proceeding raises several important and far-reaching questions. It claims to be a common carrier within the meaning of the act to regulate commerce, engaged in the transportation of passengers and property from one State to another by means of a line of railroad. It also claims as such common carrier to be entitled to the same facilities for the interchange of traffic with the defendant at a point selected by itself that the defendant affords to other lines at its regular yards and depots, and further demands like interchanges of traffic with the defendant for other lines of railroad that make use of the petitioner's bridge. The results aimed at are, therefore, that through routes and through rates shall be established by the defendant over the bridge of the petitioner, and that any contract obligations the defendant may have previously entered into or other considerations, public or private, must yield to the mandate of the statute, as interpreted by the petitioner.

The claim is, in effect, that carriers in serving the public shall be compelled to use the petitioner's bridge as part of their transportation lines, and that the statute affords sufficient warrant for this demand.

If the claim of the petitioner can be sustained any other bridge used for the passage of railroad trains may insist on similar rights, and any traction of a road may allay itself of right to the railroad system of the country on equal terms. Upon this hypothesis the unification of the railways of the country has become an accomplished fact, and through routes and through joint rates must follow wherever they may be demanded. This sweeping interpretation does not seem to be the fair and legitimate construction of the act to regulate commerce.

The power to regulate commerce was conferred upon the General Government for public purposes, and its exercise must be assumed to be in consonance with those purposes. The most important of these purposes are that commerce among the States shall be free, and not hindered or obstructed in its movements, nor burdened by exactions imposed by any other authority than Congress. But Congress does not create the carriers of commerce, nor sustain any rela-

Questions
raised—Peti-
tioner's claim.

Effect of sus-
taining peti-
tioner's claim.

Nature of pow-
to regulate
commerce—
Public con-
cern—Inter-
state carriers.

tions to them except as they engage in that business. Individuals and corporations may engage in interstate commerce and their business thus becomes subject to such regulations as Congress may prescribe. These regulations very properly include reasonable charges, and the prohibition of all unjust discriminations and undue preferences, to the end that equality may be maintained among the citizens of the country in the conduct of their business. But the law does not require any one to engage in commerce, nor make it obligatory to foster any particular instrumentality of commercial intercourse, whether a bridge or a railroad. The freedom of citizens and corporate organizations of citizens to select such instrumentalities as they may prefer for transportation uses is unimpaired. And apart from the enactments to secure justice and equality in transportation the numerous matters that precede and attend the business of engaging in commerce among the States, including the creation of the carriers, their corporate powers, the character of their cars, the precautions for safety, their depots for receiving and discharging traffic, and their business arrangements for continuous shipments of traffic, are left to the jurisdictions under which they have their origin.

The cautious legislation of Congress applies to the movements of commerce by the agencies described in the law, when the movement is not wholly within a State. The public concern is in the freedom and expedition of the movement and the reasonableness and equality of cost, and not in any particular agency over which the movement takes place. The act takes cognizance of carriers in their relations to the interstate business they engage in, and its great purpose is that the business shall be conducted justly and impartially, and that reasonable accommodations may at all times be afforded to the public. As was said, in substance, by the Supreme Court in the Express cases: The public interest is in the transportation, and not in the agencies by which it is secured, provided they are such as to insure reasonable promptitude and safety. (117 U. S. 24; 2 Morawetz on Car., sec. 1118.)

The duties of interstate carriers toward each other relate to the important public purposes the law has in view. The questions presented are properly considered, therefore, on the theory that the public interests are of a primary concern, and that the private interests of carriers, or auxiliary agencies, are only important in the sense that the public may be reasonably and adequately served. The petitioner should show that the complaint involves more than a mere contention about a mode of establishing a through route or rate,

and that the public interests are in some manner affected by, or concerned in the controversy.

Railroad carriers are, with few exceptions, creatures of State laws defining their powers and duties, and in the absence of other authority, their sphere is within the State by which they are created. By congressional legislation many years ago State roads were authorized to connect with the roads of other States, and form continuous lines of transportation at through rates. The creation of such lines, and the basis on which they might be formed in respect to rates and interchanges of traffic, were left to the discretion of connecting roads. They might enter into arrangements with other lines or roads, and with such roads as they might deem expedient, or they were at liberty to decline. The continuous shipment and through rate were voluntary and not compulsory. A State road, however, when it engages in commerce among the States enters a field over which the General Government has jurisdiction, and must conform to the lawfully prescribed regulations for conducting that business. The act to regulate commerce applies to common carriers engaged in the transportation of passengers or property by railroad, or by railroad and water when under a common control, management or arrangement, for a continuous carriage or shipment from one State or Territory to another, and such carriers are required according to their respective powers to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines to those connecting therewith, and are forbidden to discriminate in their rates and charges between such connecting lines.

The statute assumes the existence of connecting lines and of arrangements for continuous carriage or shipment, and directs its enactments to business of that character.

By act of Congress of June 15, 1866, incorporated in section 5258 of the United States Revised Statutes, it is enacted that "every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, Government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." It was further enacted that this section shall not "be construed to authorize any railroad company to build any new road, or

State roads—
Connection
with other
roads.

Act of Con-
gress of 1866
—its effect.

any connection with another road, without authority from the State in which such railroad or connection shall be proposed." The effect of this statute is to enable business connections between railroads of different States for interstate transportation, to be lawfully made, subject to the condition, however, that such connections should be formed by authority from the State in which they might be proposed to be made.

The statute referred to authorizes railroads of one State "to connect with roads of other States so as to form continuous lines for transportation" purposes. The act to regulate commerce, as its title indicates, applies to the business of such lines when formed. It prescribes what was not contained in the former act, the rules and principles by which the business is to be governed and the public served. So much of these as apply to this case have been cited.

Provisions of
commerce act
—Facilities
for inter-
change.

By these provisions a suitable junction of lines, for "the interchange of traffic between their respective lines," for which interchange all reasonable, proper and equal facilities must be afforded, is implied, for it is enacted that "this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." And the facilities required to be afforded must be reasonable and proper, not unreasonable or improper. The act, therefore, specifies certain limitations within which interchanges between different lines may of right be demanded.

The theory of the petitioner seems to be that the right to interchange traffic, and thus establish a continuous line, is unconditional, and that one carrier may approach with its tracks the road of another carrier, and if the facilities for interchanging, in the form of depots, yards, sidings, and employees, do not exist at the point of contract, they must be provided.

Theory of pe-
titioner and
defendant.

The defendant understands its obligation under the statute to be more limited, and these differences present the points of contention between the parties.

The first question that arises upon the merits of the case is whether the petitioner, The Kentucky & Indiana Bridge Co., is a common carrier to which the provisions of the act are made applicable. A bridge company is not *per se* a common carrier. It no more suggests the duties or functions of a common carrier than a turnpike company. The usual powers of a carrier may undoubtedly be granted to a bridge company, or, in the absence of constitutional restrictions, to a

Whether
Bridge Co. is
carrier to
whom act ap-
plies.

banking association, but they have not yet been conferred upon the petitioner in this case.

It has been decided that the owner of a toll-bridge is not a common carrier. *Grigsby v. Chappell*, 5 Rich., 443. Mere forwarders of goods, though combining the character of warehousemen, are not common carriers. Persons so employed, if they have no concern in the vehicle by which the goods are sent, and have no interest in the freight, are not liable as common carriers, but only for ordinary diligence. *Angell on Car.*, 68, 5 Ed.

Courts have held that a railroad which occasionally carries goods or freight in passengers trains is not a common carrier of goods in such trains. *Elkins v. Boston & Main R.*, 3 Fost., 275. And the same rule has been applied to a railroad which occasionally carries passengers in freight trains. *Murch v. Concord R.*, 9 Fost., 9.

An individual may become a common carrier by simply engaging in the business and the rights, duties and liabilities of a common carrier will apply to him by reason of his occupation. But a corporation having an artificial existence created by law has only such rights and powers as are conferred by law, or necessarily incidental to its granted powers. It cannot lawfully engage in any other business than that authorized by law, and if it does so its acts are *ultra vires*. "The public are interested in restraining corporations to the enjoyment of the precise franchise granted and the exercise of the powers expressly conferred, and the incidental powers essential to the express power. Shareholders are also interested in keeping their trustees, the governing boards, within the limits of the delegated power with which they are clothed." *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 294.

The powers of the petitioner conferred by its charter are cited in the statement of facts so far as they relate to the uses and purposes of its bridge and tracks. These powers are appropriate and ample for the legitimate functions of a bridge company, with the necessary approaches and track accommodations for railway connections, an improvement obviously of great importance and utility, but there are no provisions in the charter that indicate an intention to create a common carrier or to regulate its duties as a carrier. Its powers may be fully exercised within the sphere of a bridge company proper, and require apparently unwarranted implications to embrace those of a common carrier. In the articles of association of the bridge company the object and purpose of the

Who are carriers—Authorities.

Corporations as carriers—Ultra vires acts.

Complainant not a common carrier—No right to act as such.

company are stated to be to construct, own and operate a bridge from a point in the city of New Albany across the Ohio river to a point in the city of Louisville, for both railway and common roadway purposes, together with a causeway, as an extension of, and connection with, said bridge. It is reasonably clear from the provisions of its charter and its articles of association, that the petitioner was not chartered as a common carrier or railroad company, but to construct and maintain a bridge as a means of transit over the Ohio river, with the approaches thereto, and track connections with the railroads entering Louisville and New Albany, on either side of the river. The charter contains none of the provisions usually incorporated in railroad charters or expressed in general laws defining the duties and powers of a company as a carrier of passengers and property, and regulating its management or business. Consistently with the object of incorporation as a bridge company, with incidental facilities of connections with railways, it has no transportation equipment except five engines used for switching purposes, and ten passenger coaches for local transit over the river, and has leased the use of the bridge to the Ohio & Mississippi R. Co., with the right to haul all cars for through shipments over the bridge, and giving that company a preference for its engines, cars and trains in the use of the bridge.

It publishes no tariffs except the tolls for crossing the bridge, which specify the class rates per hundred pounds under the official classification, and a few special car-load rates upon six heavy commodities.

It would seem that the authorities of Kentucky did not regard the petitioner as in any sense a railroad company or common carrier, as no mention is made of it in the report of the railroad commissioners of that State for the year 1887, and no report from the company appears in that document.

In a limited and local sense the petitioner exercises the functions of a common carrier. It transfers local passengers over the bridge between Louisville and New Albany, and gathers freight at New Albany and in Louisville, and bills it to the railroads entering those cities, but the cars used for such freight are ordered from the companies by which they are transported. The freight is paid for by the ton to the road furnishing the cars, and no transportation charge is made by the petitioner for freight other than the bridge toll and switching charges. All through traffic is hauled over the bridge by the Ohio & Mississippi R. Co., the lessee of the bridge, with its own engines and trainmen.

Functions of
carrier exer-
cised by peti-
tioner.

This limited and terminal service does not make it a com-

mon carrier operating a line of railroad for interstate transportation in the sense of the Act to regulate commerce. It furnishes an important and very useful facility for such lines in moving traffic, and, under the Act, the bridge is to be deemed a part of the line of any railroad company that operates it in connection with its road. Independently, therefore, as a bridge company it is not such a common carrier as, under the Act, to require an interchange of traffic of a through character with other carriers engaged in such business. The two bridges at Louisville sustain practically the same relation to the carriers that use them for interstate transportation. If, therefore, the petitioner can compel interchanges of traffic with the defendant on the Kentucky side of the river, the Louisville Bridge Company, for the same reasons, can compel interchanges of traffic with the Ohio & Mississippi R. Co. on the Indiana side, and any other bridge company similarly situated would have the same right, and carriers would be obliged to form through routes and make through rates not only with lines using such bridges, but with every bridge that might establish track connections for that purpose. This is certainly not required by the present statute.

For the reasons that the petitioner, by its charter, is only a bridge and transfer company, with powers limited to that business; that it has no equipment except five engines and ten passenger coaches; that it has in fact no line except its bridge and the approaches thereto connecting it with lines of road; that it does not haul or handle through traffic over the bridge; that it does not issue, file and publish any tariffs, except for the bridge tolls, and pays like other shippers for freight collected and shipped by it in the cars of other roads ordered and furnished for the purpose; that it has no concern in the vehicles by which the goods are transported and no interest in the freight charges, it is not a common carrier within the purview of the Act to regulate commerce, but at most only a *quasi* carrier, and therefore cannot maintain this proceeding that on ground.

But although not in the proper sense a common carrier the petitioner engages in certain traffic operations which require the co-operation of other roads to render them useful to the public and valuable to the petitioner. Its relation to traffic consists in the collection of freight at Louisville and New Albany all bearing Louisville rates and which when intended for points on defendant's road, is loaded in cars ordered from the defendant. The defendant has at all times been willing to

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receive and deliver this traffic at its regular yards and depots in Louisville, but until the time of the hearing was unwilling and refused to interchange the traffic at Seventh street and Magnolia avenue for the reason that that point was not strictly a freight yard or depot.

On the hearing, however, and subsequently in a brief filed, the defendant, by its counsel, conceded that Seventh street and Magnolia avenue may be regarded as a proper point for the interchange of traffic between the parties so far as the trouble and expense of the interchange is concerned, and that as to traffic to or from points on the terminal railway of petitioner in Louisville which pays Louisville local rates, and is not destined to cross the river at Louisville, the petitioner is a carrier *de facto* though not *de jure*; and that if the Commission should be of opinion that the statute gives the right of interchange to one who is only a carrier *de facto*, then that the petitioner may be entitled to demand an interchange of that kind of traffic at the point mentioned. It was insisted, however, that the petitioner is not, by its charter, a common carrier, and that a corporation cannot lawfully demand an interchange of freight unless it can show that it is of right, as well as in fact, a common carrier. That, therefore, the right to demand an interchange of that kind of traffic belongs to the shippers or consignees at Louisville, and not to the petitioner.

Defendant's
concessions
and concessions.

This summarizes the position of the defendant. It says substantially: "We will exchange with the petitioner all freight tendered to us or to be received from us at the track connection at Seventh street and Magnolia avenue bearing local Louisville rates in the same manner and on the same terms as at our regular yards and depots, waiving the objections that the point of exchange is not at a depot and the petitioner not a common carrier, and we do so because the public will be accommodated, and the additional expense and trouble of the interchange at that point are too unimportant to contend about, and because the question of rates is not involved. But as to through freight crossing the river in either direction coming from or destined to other lines, that presents a different question, for it involves joint through rates and our contract obligations with the Louisville bridge in which we have an interest, and with other lines parties to that contract, upon which question we have a right to be consulted."

The contention of the defendant seems neither unreasonable nor unlawful. Its waiver of its legal right to receive and deliver freight at its depot and its consent to the interchange at the track connection, notwithstanding the opposite posi-

tion taken in its answer, are reasonable and proper to be done. The interchange at that point is feasible by reason of side tracks and switching facilities, and it is in the public interest. This compliance with the petitioner's demand satisfies so much of the complaint as the petitioner can lawfully press assuming it to be a *de facto* carrier or a forwarder or shipper.

The petitioner also asks that the defendant may be compelled to interchange through traffic passing over its bridge from and to the Ohio and Mississippi railroad. This is, in substance a demand that the defendant shall make a through route with the Ohio and Mississippi R. Co. over the petitioner's bridge. This the petitioner has no right to demand. It has lawful right to secure business for its bridge, to make contracts with railroads and others for its use, but it has no authority to compel a carrier to make its bridge a part of its line of road and to enter into a business connection with another carrier in order that the traffic may pass over its bridge. The petitioner has no interest as a carrier in the transportation itself. It does not haul this traffic, but it is hauled by the Ohio and Mississippi Company. It is not a party to any through rates. Its interest is in the tolls or compensation for the use of its bridge and the switching charges over its terminal connections with railroad lines. Complaint for refusing to make a through route or through rates with the Ohio & Mississippi railroad should come directly from that company. There is no evidence in this proceeding, other than the allegations of the petitioner, that the Ohio & Mississippi R. Co. desires such interchanges of traffic and through rates, although it was so argued by counsel. The fact that the defendant's refusal rests solely on the use of the petitioner's bridge does not authorize the petitioner to litigate the question. That controversy, if any, is with the Ohio & Mississippi R. Co., and that company is the party to institute a complaint and prosecute it. No order can be made for or against a carrier unless it is a party to the record.

But if the petitioner could legitimately institute a proceeding for the benefit of the Ohio & Mississippi R. Co. it could not maintain this proceeding on the facts presented. The question is not whether an interchange of business between the Ohio & Mississippi R. Co. and the defendant, under arrangements for continuous shipments, whether on joint through rates or otherwise, shall take place at all. The defendant insists it has not refused, but the contention is: How this shall be done.

The interchange of traffic at through rates between the

Interchange of
business with
Ohio & M. Co.

Ohio & Mississippi Railroad and the defendant has been carried on for many years over the Louisville bridge, under a contract to which both of these companies and others were parties, and which is still in force, and the exchanges of freight and passengers were made at the regular depots and yards of the defendant in the city of Louisville. The question presented is whether the Ohio & Mississippi R. Co., through the petitioner, can compel the defendant to make such interchanges over the petitioner's bridge, and at a point where the defendant has no depot or employees stationed and at some distance from its regular yards and depots. Unless the statute is imperative that one carrier may connect its tracks and require a business connection with another carrier at any point it may select, this cannot be done. A railroad company has the right to establish depots for receiving and delivering freight and passengers. It is not bound to receive or deliver them elsewhere unless expressly required to do so by statute. *A., T. & S. Railroad v. D., N. & O. Railroad*, 110 U. S., 681; s. c. 16 Am. & Eng. R. R. Cas. 57. It was ruled in that case that it does not follow as a necessary consequence from the statutory right of a connection of tracks, or a prohibition against undue or unwarrantable discrimination in facilities, that any railroad company which forces a connection of its road with that of another company has a right to require the company with which it connects to do a through business at joint rates at the place of junction, if it does a similar business with any other company at another point and under dissimilar circumstances. *Ibid.*, 683.

The act to regulate commerce adds materially to the provision of the constitution of Colorado under consideration in that case, but many of the general principles so strongly and clearly expressed by the Chief Justice may still be safely consulted.

The consequences of a principle sought to be applied are sometimes a fair test of its soundness. If it be assumed that one road can make a track connection with another at any point it may choose and then demand a business connection on the same terms as may be afforded to other roads elsewhere, the practical effect is to make an initial carrier dominant over all connecting carriers to any remote point of shipment.

Effect of principle sought to be applied.

The authority given by law to connect roads so as to form continuous lines of transportation implies that these connections are to be formed by mutual agreement. And the provision that such lines must afford all reasonable, proper and equal facilities for moving traffic to other lines also implies inquiry into the reasonableness and propriety of the facilities

demand in any case. Unless a carrier can be protected against an unreasonable demand for an interchange of business at an inconvenient place, or at a sacrifice of its interests, it may be subjected to serious injury and lose proper control of its own business, and the effect may be to retard instead of to accelerate transportation,

It would seem to follow that a carrier is not arbitrarily, and under any circumstances, required to erect depots, yards and sidings, and maintain a force of employees necessary for business interchanges, at any point where another carrier may locate a track connection, and that the necessary facilities are ordinarily supplied when afforded at regular depots sufficient for the purpose. Certain implications may sometimes be allowed to give full effect to general enactments, but when a right or duty is demanded under an implication that is doubtful or plainly inconsistent with other rights it is safer to await positive legislative action thereon. In exceptional cases, involving a necessity for business connections elsewhere by reason of the opening of a new line, or the volume of business to be accommodated, it may be assumed that carriers will find it to their interest to make suitable provision for them; or the peculiar facts of the case might warrant appropriate action to enforce the interchange.

In this case, the defendant, it is understood, makes no objection to receiving and delivering through freight carried over the petitioner's bridge at local Louisville rates the same as for any other Louisville shipper or consignee. It appears in evidence that the defendant company has arrangements with the four roads entering Louisville from the north side of the Ohio river by the Louisville bridge for interchanging freight traffic upon terms and conditions agreed upon between them, and the defendant refuses to receive freight from those roads except upon the terms and conditions agreed upon. If those roads bring freight to Louisville in violation of the agreement, the defendant refuses to receive and transport such freight except as a local Louisville shipper, and the freight so received is treated the same as freight tendered for shipment by Louisville shippers.

The Ohio & Mississippi Railroad is one of the roads with which the agreement referred to in the testimony was made. Under its agreement it has the same rights for interchange of traffic with the defendant over the Louisville bridge as the other roads that enter Louisville by that bridge, and when it violates that agreement by bringing its freight over the petitioner's bridge

Duties of carriers as to facilities for interchange.

Defendant's agreement with other roads.

Same—grievance of Ohio & M. R. Co.

its freight is not refused, but is received as from Louisville shippers. The same rule is applied to the other roads, and all are upon an equality in that respect. The Ohio and Mississippi road is not denied any privileges or facilities that the other roads enjoy. Its grievance is that its rescission of its contract with the defendant and with the Louisville Bridge Co. is not acquiesced in, and that exceptional facilities are not afforded it. It is not shown that any controlling necessity exists for the change. No reason for it relating to transportation appears in the evidence. Its action is apparently taken from choice.

Incidental to the question of a through route over the petitioner's bridge and terminal tracks as matter of right some other facts appear in the testimony.

By a provision of the charter of the defendant (section 18) power is reserved to the State of Kentucky to in-
 corporate a company or companies to build a rail-
 road or railroads, and that any and all such rail-
 road or railroads thereafter constructed may connect and join
 with the railroad of the defendant; and the same section also
 enacts "that it shall not be lawful for any other company or
 any other person or persons to travel upon or use any of the
 roads of said company (the defendant) or to transport persons
 or property thereon without the license and permission of the
 president and directors thereof."

Provisions of
 charter of de-
 fendant.

By the charter of the petitioner it is authorized "to run any line of railways through the city of Louisville to connect with any railway bridge, transfer company or depot," and by later amendments "to construct such line or lines in the county of Jefferson, Kentucky, as may be necessary to complete the connection with other railways or depots."

The original charter contemplated a connection at a depot, and the subsequent amendments, although not very clear, might seem to allow a connection elsewhere, but that is by no means the necessary construction.

An amendment to the defendant's charter, made in 1860, provides "that said company may make arrangements with other companies for through freight and passage from distant points, on such terms as they may agree from time to time."

The ordinances of the city of Louisville granting to the petitioner the right to lay its tracks in that city provide that the petitioner shall permit other roads desir-
 ing to connect through such portions of the city to
 use the railway tracks laid down pursuant to the
 ordinances, upon conditions specified as follows:

Ordinances of
 city of Louis-
 ville as to use
 of petitioner's
 tracks.

"That before entering upon the use of said tracks said railway company shall pay to the Kentucky & Indiana Bridge Co.

its *pro rata* share of the cost of constructing the same, including damages awarded by reason of the construction thereof, and shall bind itself by contracts with the city of Louisville for the benefit of all the parties interested, that it will contribute its *pro rata* share toward the repair and maintenance of said tracks and toward the construction and maintenance of any additional tracks, and of any gates, approaches, culverts, bridges or trestles, or fills, that may be necessary to the safe and efficient use of said tracks, and towards the maintaining of such watchmen as may be necessary to the proper guarding of the street crossings, and such roads shall be subject, under such use, to all the provisions of this ordinance."

What authority the city of Louisville had to include such conditions in its ordinance does not appear, unless
 Same—Author- from a clause in the petitioner's charter authorizing
 ity to enact or- it to "run any number of lines through the city of
 dinance—Force Louisville, upon such terms as may be prescribed
 of conditions. by ordinance of said city of Louisville, or along
 any street or alley, to connect with any railway bridge, trans-
 fer company or depot." Whether these conditions have any
 force, and whether they may apply to interchanges of through
 traffic over the petitioner's bridge and tracks in Louisville,
 may be controverted questions, but that possible contention
 may grow out of them is apparent. They may fairly be con-
 sidered, therefore, upon the question of compelling a through
 route.

The contract of June 5, 1872, entered into by the Louisville
 Contract of Bridge Co., the Jeffersonville, Madison & Indian-
 June 5th, apolis R. Co., the Ohio & Mississippi R. Co.,
 1872, as objec- and the Louisville & Nashville R. Co., and
 tion to compul- which, by its terms, was to continue in force until
 sory inter- the expiration of two years after written notice of
 change. an intention by any of the parties to recede from it, is strongly
 urged by the defendant as a valid objection to a compulsory
 interchange of through traffic with the Ohio & Mississippi
 Railway over the petitioner's bridge.

On the 4th of February, 1888, the Ohio & Mississippi R.
 Co. gave notice of its intention to withdraw from the con-
 tract at twelve o'clock noon of that day. The two years
 stipulated in the contract, during which it should continue
 in force after notice, will not expire until February 4, 1890.

By the contract the several railroad parties to it agreed,
 among other things, to pass over the Louisville bridge all
 the freight, passengers, mails, express matter, and other
 goods carried on or over this road to and from Louisville,
 and to and from points which require their passage over the

Ohio river at or near Louisville during the existence of the agreement.

The petitioner claims that this contract was abrogated by the provisions of the act to regulate commerce. The defendant insists that it is unaffected by that act. Whether congressional legislation can rightfully impair the obligation of a valid contract was not discussed, and is not involved. As the powers of Congress are granted powers, it may be, as some argue, a fair presumption that the framers of the Constitution understood that the instrument contained no actual or implied grant of power to destroy the obligation of a contract in view of the careful inhibition of the exercise of such power by the States. On the other hand, if, as argued by others, contracts must be deemed entered into in contemplation of possible legislation, under constitutional powers, that may arrest their fulfilment, and therefore, if embraced within the scope of the power, are subject to legislative authority; nevertheless, in that view the purpose to annul a contract by law should affirmatively and clearly appear, or be the necessary effect of a strict construction of the statute. The obligation of a contract is its binding force for all the lawful purposes for which it was made.

Parties to contracts may, as is claimed, be indirectly affected by general laws rendering the performance of their agreements oppressive or otherwise and diminishing or enhancing their value. Revenue laws are instances of this character. But parties are not relieved from the obligation of a contract because its performance may be more burdensome to one, or more profitable to another, whether by reason of legislation or other causes. A tax on contracts does not affect their obligation or validity. *Moore v. Moore*, 47 N. Y. 467.

A State, in the exercise of its sovereign power to construct a public work, cannot, by suspending the work, escape the obligation of its contract. *Danolds v. State of N. Y.* 89 N. Y. 36. The act to regulate commerce does not directly nor indirectly affect the contract in question. It adds no burden to it whatever. The contract is as easy of performance and as beneficial in all respects as before the act. It was entered into under statute authority and was valid when made. It was in aid of commerce and beneficial to the public and to the parties. It is not repugnant to the provisions of the act. It is not like pooling contracts, or contracts for discriminating rates and rebates which are invalid without a statute declaring them void, because immoral and against public policy. It belongs to the class of contracts expressly recognized by the act. The sixth section provides that "every such com-

Effect of commerce act on contract.

mon carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party."

The Act affords no warrant for the argument that it abrogates this contract. Even in England where the power of Parliament is supreme, the courts have ruled that the legislative intention to annul a contract should appear by express enactment or be necessarily required by the language of the act strictly construed. *S. E. R. Co. v. R. Com'rs L. R.*, Queen's B. Div. 231.

But the Ohio & Mississippi railway says, through the petitioner, "the act to regulate commerce has created a new right, and by claiming that I can absolve myself from the obligation of my contract, and compel those with whom I contracted to support me in my course and enter into new and different relations with me."

The answer is that the law does not authorize this to be done, and that the new right is not absolute, but in a measure conditional. Laws do not favor violations of contracts, but punish parties that break them. If it be said that the contract remains valid, but the defendant must submit to a breach of it and lose its benefits and resort to an action of damages for redress, that imputes to the law the paradox that the contract is valid, but binds no one, and a suit may be brought for the breach of an agreement that may be lawfully broken.

If the contract is valid, as it clearly is, the direct and simple mode of dealing with it is to regard it as a satisfactory and valid objection to the demand of the Ohio & Mississippi railway for a new traffic arrangement under different circumstances. It is not reasonable, pending this contract, which confessedly affords reasonable, proper, and equal facilities to all concerned, to sustain a demand for a different mode of interchange involving a necessity for other agreements, and to be followed by litigation to settle disputed rights.

It was urged on the argument, and it is manifest, that though this proceeding is nominally for a through route over the petitioner's bridge, its ultimate object is for through rates by that route. The pleadings do not distinctly make an issue for a rate, and the evidence furnishes no foundation for an order on that subject. But the question has been brought into the discussion, it would seem, with the view of eliciting some ruling or expression with regard to the right to a through rate. And if the right to the route be allowed it may be difficult to distinguish the right to the rate. The argument that finds support for the one demand in the requirement for equal facilities, as an uncon-

Through rates
as object of
proceeding.

ditional right, applies with great force to the other, if a through rate is to be construed as a facility under our statute.

The English statute in terms enumerates through rates as one of the facilities to be afforded. But under the English statute the right to a route or rate, if objected to, must be determined by the Commission in view of its reasonableness.

The act provides that "if objection be made to the granting of the rate, or to the route, the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly."

"The Commission in apportioning the through rates shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, and making of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof."

Our statute contains no such enactments. But it is plain from the language of the third section in the clause requiring carriers to "afford all reasonable, proper, and equal facilities" that authority to decide upon the reasonableness of the facility demanded, whether a route with interchanges, or a rate, is lodged somewhere, and is one of the powers conferred upon the Commission. And in determining the reasonableness of the facility demanded whatever legitimately and lawfully affects the question is to be considered, as well as the corporate and physical power to comply.

In view of the vast network of railways in this country and the great extent of territory traversed by them, the diversities that characterize the roads, their differences in length, and in cost of construction and operation, the character of traffic they carry, their financial condition, and many other things, it is obvious that very many considerations enter into the making of continuous routes or joint through rates, and that the corporate and physical power of doing so is only one, and not the most important. As an illustration, if a line from the seaboard to Chicago, like the Pennsylvania line, should have a connection for through business, on joint rates to St. Paul, and the other six lines between Chicago and St. Paul should demand equal facilities, would the physical possibility of affording them alone control, or would the circumstances materially affecting the reasonableness of compliance be lawfully entitled to consideration?

Chief Justice Waite states as the judgment of the Court in 110 U. S. Rep:

"At common law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others than he would if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own business."

How much of the rights thus declared remain under the "statutory regulations to the contrary" of the act to regulate commerce is an important question. If through rates are included in the equal facilities to be afforded the reasonableness of the mode of affording them would seem to remain. And in that respect considerations are involved of a like nature as in the interchange of traffic.

In this case there is no refusal by the defendant of interchanges of traffic with the Ohio and Mississippi road, nor of a through rate upon the traffic interchanged. The contention is concerning the mode of interchange. The defendant insists that in view of its contract obligations and the other reasons given it should be done over the Louisville bridge and at its own yards and stations, where the defendant makes exchanges with other companies and "takes on and lets off passengers and property for others," and which "in the exercise of its legal discretion it located for its own convenience and that of the public.

The demand in the behalf of the Ohio & Mississippi road is for a mode of interchange including a through rate, that the defendant deems unreasonable and unlawful. It appears that the interchanges have gone on without interruption for sixteen years, that the public has been adequately served, and that the defendant is willing and desirous to continue the same mode of conducting a through business which is in fact equal to all. The only reason given for changing this mode is that the Ohio and Mississippi road desires to use another bridge. The defendant has an equal right to use the bridge to which its depots and business facilities are adapted. This important fact, together with its large pecuniary interest in that bridge, and its contract relations to it, furnish reasonable and lawful grounds to support its position. Upon the question of interchanges with the Ohio & Mississippi road the order of the Commission should therefore be that the defendant's position is sustained.

SCOFIELD *et al.*

v.

LAKE SHORE AND MICHIGAN SOUTHERN R. CO.

(Interstate Commerce Commission, July 19, 1888.)

Interstate Commerce—Freight Rates—Carload Lots—Discrimination.—In an application by certain oil refiners, it appeared that a railroad company was in the habit of charging a rate on oil shipped in barrels in less than carload lots, which was twice as great as the charge upon oil shipped in carload lots. The evidence showed that when oil was shipped in carload lots, it went directly to its destination; that it was loaded by the shipper and unloaded by the consignor and consignee, that only one entry upon the bill of lading was made and that the time occupied in transportation was far less than in the case of shipments in less than carload quantities. When the shipment was made in less than carload quantities, a separate entry for each item had to be made upon the bill of lading and way bill; the shipment was by local freight trains, which stopped at every station for which there was freight, the freight was loaded and unloaded by the company, there were as many collections for charge of freight as there were different parcels, and the time occupied in transportation was usually two or three times as long as in the case of the carload shipments. It also appeared that it occupied the whole car, the material being such that no other could be carried along with it. It was also shown that there was a considerable element of danger in handling the oil in small lots, such lots being unloaded by the carrier and placed in the local station house, while carload lots were usually unloaded by the consignee at a distance from the depot building, and immediately removed from the companies' premises. *Held*, that in view of all the facts, the rate charged for the transportation of oil in less than carload lots was not unreasonable when compared with the rate for carload lots.

Same—Tank Cars—Carload Lots in Barrels.—The evidence showed that the rate per barrel charged for oil when shipped in barrels in carload lots, was from one third to one fourth higher than the rate per barrel when shipped in bulk in tank-cars. It also appeared that when shipped to the West in barrels, stock-cars were used for which there was usually a return load, but when shipped in bulk in tank-cars there was no return load upon Western shipments. It was shown that the largest number of barrels hauled in the tank-car was 96 barrels, and in the stock-car the number of barrels was only 61. In both cases the cars were loaded by the shipper and unloaded by the consignee. *Held*, that the rates as charged, operated unjustly in favor of shippers of oil in bulk in tank-cars, and that the carrier must in each case make the rate by weight, which should be by the 100 lbs. instead of by the barrel, the carrier of course charging for the weight of the barrel as part of the freight.

Same—Haulage of Tank-Cars.—The carrier may arrange with a shipper of oil that the latter shall furnish cars for the shipment at terms agreed upon between him and the carrier, but in doing so the carrier is charged with the duty of seeing at his peril that neither directly nor indirectly is a

higher rate given to such shipper than to others who are engaged in the same business, who are dependent on the carrier for cars.

Same—Tank Cars—Power of Commission.—Under the act to regulate Commerce, the Interstate Commerce Commission has not the power of directing a carrier to supply itself with an equipment of cars for the transportation of freight upon its line, and hence the commission has no authority to order a railroad company to furnish with tank-cars to shippers for transportation of oil.

Same—Car Rental—Reasonableness.—A rate of three fourths of one cent per mile for the rental of cars supplied by another than the carrier is a reasonable rate, such having been the rate in use for many years, and being generally charged by car furnishing companies.

COMPLAINT by William C. Scofield, Daniel Shurmer, John Teagle, and Charles W. Scofield, partners under the firm name and style of Scofield, Shurmer and Teagle; James R. Timmins and Andrew R. Timmins, partners under the firm name and style of J. R. Timmins & Co.; Christian J. Wurwage, doing business under the name and style of The Manufacturers' Oil Co.; John W. Fawcett and Thomas F. Wright, partners under the name and style of J. W. Fawcett & Co.; Alfred Whitaker, doing business under the name and style of The Brooks Oil Co.; William F. Vliet, Willard L. Nutt and Martin P. Case, partners under the name and style of Vliet, Nutt & Co.; W. Carroll Lawrence, Felix Burgert, Henry C. Meyers and August E. Schade, partners under the name and style of The Merchants' Oil Co.; The Excelsior Refining Co., a corporation organized under the laws of Ohio; The Globe Oil Co., a corporation organized under the laws of Ohio; The Cleveland Refining Co., a corporation organized under the laws of Ohio; Louis C. Carran, doing business under the name and style of L. C. Carran & Co., against the Lake Shore & Michigan Southern R. Co., complaining of an unjust discrimination of rates in the transportation of oil.

The question in issue appear in the opinion.

Blanden & Buell counsel for petitioners.

George C. Greene counsel for defendant.

BRAGG, C.—The complaint contains the following averments: That William C. Scofield, Daniel Shurmer, John Teagle, and Charles W. Scofield are partners under the name and style of Scofield, Shurmer and Teagle; that James R. Timmins and Andrew R. Timmins are partners under the name and style of James R. Timmins & Co.; that Christian J. Wurwage is doing business under the name and style of The Manufacturer's Oil Co.; that John W. Fawcett and Thomas F. Wright are part-

Averments
contained in
complaint.

ners under the name and style of J. W. Fawcett & Co.; that Alfred Whitaker is doing business under the name and style of The Brooks Oil Co.; that William F. Vliet, Willard L. Nutt, and Martin P. Case are partners under the name and style of Vliet, Nutt & Co.; that W. Carroll Lawrence, Felix Burgert, Henry C. Meyers, and August C. Schade are partners under the name and style of The Merchants' Oil Co.; that the Excelsior Refining Co. is a corporation duly organized under the laws of the State of Ohio; that the Globe Oil Co. is a corporation duly organized under the laws of the State of Ohio; that The Cleveland Refining Co. is a corporation duly organized under the laws of the State of Ohio, and that Louis C. Carran is doing business under the name and style of L. C. Carran & Co.

The defendant, The Lake Shore & Michigan Southern R. Co., is a corporation organized under the laws of the State of Ohio, and has its principal office in the city of Cleveland, in said State; that it is consolidated with corporations duly organized in the States of New York, Pennsylvania, Indiana, Michigan, and Illinois, respectively; that as thus consolidated it owns and operates a continuous line of railroad from the city of Buffalo, in the State of New York, through the said city of Cleveland, in the State of Ohio, to the city of Chicago in the State of Illinois; that said continuous line extends through and reaches places hereinafter named and others in the States of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois; that said railway company is a common carrier upon said line of railroad, engaged in the transportation of passengers and property to and from said city of Cleveland, from and to places without said State of Ohio.

Complainants are all engaged in the business of refining, manufacturing, and dealing in petroleum and its products at said city of Cleveland, and in pursuance of said business ship their goods over defendant's said line of railroad to places without said State of Ohio reached by said line of road, its branches and connections.

1st. The defendant has established and published a schedule showing the rates and charges for the transportation of petroleum and its products in barrels upon its said railroad, in carload lots and in less than carload lots, and which is now in force thereon. Said rates and charges for less than carload lots are excessive, unjust and unreasonable; and as evidencing and illustrating said allegations of excessiveness, injustice and unreasonableness, they show that said rates in carload lots and in less than carload lots from said city of Cleveland to the places named are as follows, viz.:

	In carload lots, per barrel.	Less than carload lots, per barrel.
To Chicago, in the State of Illinois.....	50 cts.	\$1 00
To Grand Rapids, in the State of Michigan	50	1 00
To Kalamazoo, in the State of Michigan..	40	92
To Detroit, in the State of Michigan.....	30	64

2d. The defendant has established and published a schedule showing the rates and charges for the transportation of petroleum and its products in barrels in carload lots, and in bulk in tank-cars upon its said railroad, which is now in force thereon. Said rates and charges for transportation in barrels in carload lots are excessive, unjust and unreasonable; and as evidencing and illustrating said excessiveness, injustice, and unreasonableness they show that said rates and charges in barrels in carload lots and in bulk in tank-cars from said city of Cleveland to the places named are as follows, viz.:

	Carload lots in bulk in tank-cars, per barrel.	Carload lots in bar- rels, per barrel.
To Chicago, in the State of Illinois.....	38 cts.	50 cts.
To Detroit, in the State of Michigan.....	22 cts.	30 cts.
To Buffalo, in the State of New York....	25 cts.	34 cts.
To Kalamazoo, in the State of Michigan..	35 cts.	46 cts.

3d. The defendant has established and published a schedule of rates and charges for the transportation of petroleum and its products in barrels in carload lots and in less than carload lots upon its said railroad, and which is now in force thereon. Said rates and charges constitute and are an undue and unreasonable preference and advantage to the said traffic in carload lots, and an undue and unreasonable prejudice and disadvantage to said traffic in less than carload lots; and as evidencing and illustrating said undue and unreasonable preference and prejudice and disadvantage, respectively, they show that the said rates and charges in carload lots, and in less than carload lots, respectively, from said city of Cleveland to the places named are as follows, viz.:

	In carload lots, per barrel.	Less than carload lots, per barrel.
To Chicago, in the State of Illinois.....	50 cts.	\$1 00
To Grand Rapids, in the State of Michigan	50 cts.	1 00
To Kalamazoo, in the State of Michigan..	40 cts.	92
To Buffalo, in the State of New York.....	34 cts.	56
To Detroit, in the State of Michigan.....	30 cts.	64
To South Bend, in the State of Indiana...	42 cts.	92

4th. Defendant has established and published a schedule of rates and charges for transportation of petroleum and its products in bulk in tank-cars and in carload lots in barrels,

and in less than carload lots in barrels upon its said railroad, and which is now in force thereon. Said rates and charges constitute and are an undue and unreasonable preference and advantage to the said traffic in bulk in tank-cars and an undue and unreasonable prejudice and disadvantage to said traffic in carload lots in barrels and in less than carload lots in barrels; and as evidencing and illustrating said undue and unreasonable preference and prejudice and disadvantage, respectively, they show that the said rates and charges in bulk in tank-cars and in carload lots in barrels and in less than carload lots in barrels, respectively, from said city of Cleveland to the places named are as follows, viz.:

	In tank-cars, per barrel.	In barrels in carload lots per barrel.	In bbls. less than carload lots, per bbl.
To Chicago, in the State of Illinois.....	38 cts.	50 cts.	\$1 00
To Buffalo, in the State of New York....	25	34	56
To Detroit, in the State of Michigan.....	22	30	64
To Grand Rapids, in the State of Michigan	38	50	1 00
To Kalamazoo, in the State of Michigan..	35	46	92
To South Bend, in the State of Indiana..	31½	42	92
To Elkhart, in the State of Indiana.....	31½	42	88
To Erie, in the State of Pennsylvania....	22	30	54

5th. The defendant has established and published a schedule of rates and charges for the transportation of petroleum and its products in barrels in carload lots and in less than carload lots from said city of Cleveland to places without and beyond the State of Ohio, reached by its said line of railroad, and which is now in force thereon; that as a part of said schedule of rates and charges it is provided that a minimum carload in barrels shall be sixty barrels. The rates and charges per barrel for less than carload lots as thus established is from fifty to one hundred and fifty per cent higher than the rate in carload lots. The floor capacity of defendant's cars, in which said commodities are transported in barrels, is from forty-eight to not more than fifty-three of said barrels, and for the transportation of said commodities when transported in said cars to the full floor capacity thereof, and in quantities less than sixty barrels, defendant charges the less than carload rates for each barrel. In order to transport in each of said cars sixty barrels of said commodities it becomes and is necessary that those barrels in excess of the floor capacity be placed upon the top of those upon the floor, which cause leakage and damage to the barrels thus placed above and below, which said leakage and damage is by said schedule entirely at the risk of the owner. Said regulation of said schedule, fixing sixty barrels as a

minimum carload, is unjust and unreasonable; and the charge per barrel at said less than carload rates on the full floor capacity of the car when that is less than sixty barrels, is excessive, unjust, and unreasonable.

6th. Defendant has established and published a schedule of rates and charges for the transportation of petroleum and its products in bulk in tank-cars, and that it transports a large quantity of said commodities at said rates in said tank-cars; that defendant fails and refuses to furnish to complainants the tank-cars necessary to ship said commodities at said rates, according to said schedule, and defendant refuses to furnish the apparatus, facilities, and appliances needful to load and unload said commodities transported and to be transported in bulk in said tank-cars; that said defendant rebates from its said schedule rates and charges to shippers furnishing said tank-cars a mileage allowance of three-fourths of a cent for each and every said tank-car so furnished by shippers. Said defendant in its said schedule charges for the transportation of said commodities in said tank-cars a less amount than it charges for the transportation of said commodities in barrels, and that said less amount, in combination with said mileage allowance, constitutes and is an undue and unreasonable preference and advantage to the said traffic in bulk in tank-cars over the said traffic in barrels, and constitutes and is an undue and unreasonable prejudice and disadvantage to said traffic in barrels.

7th. The Standard Oil Co. is a corporation duly organized under the laws of the State of Ohio, with its principal office in the city of Cleveland and in said State, and is engaged in the business of refining, manufacturing, and dealing in petroleum and its products, and ships said commodities in tank-cars in the manner aforesaid over defendant's said railroad from said city of Cleveland to places thereon without the State of Ohio at said rates.

That the facts, acts, and omissions of defendant hereinbefore set forth in the complaints numbered, respectively, from one to seven, inclusive, separately and in combination, all and singular, constitute and are, and by defendant are designed to be, a device whereby defendant charges, demands, collects, and receives from said Standard Oil Co. a less sum for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions than it charges, demands, collects, and receives from complainants therefor; and whereby defendant makes and gives and intends to make and give an undue and unreasonable preference and advantage to said Standard Oil Co. in the transportation of said commodities,

and subjects and intends to subject complainants to an undue and unreasonable prejudice and disadvantage in the transportation of said commodities.

By way of general averment, and as additional and supplementary to each and every of the above stated and numbered complaints, and for brevity of statement, complainants attach hereto the several schedules of rates and charges of the defendant above referred to, and make the same a part hereof and of each and every of said complaints stated and numbered as aforesaid.

That petroleum and its products herein referred to are, by the classification adopted by the defendant and in force upon its said line of railroad, classed as third class and charged accordingly upon a computation of four hundred pounds weight for each and every barrel when transported in less than car-load lots.

The prayer of the petition is that the Commission investigate the charges and complaints herein preferred, and if said acts and omissions complained of are found to exist and to be unlawful, the Commission will order and direct said defendant to desist from and cease such unlawful acts and omissions, and for all such further action, order, and finding in the premises as to the Commission may seem just and right.

To the foregoing complaint, the Lake Shore & Michigan Southern R. Co. answered as follows:

1st. It admits the allegations contained in the petition touching the complainants, copartnerships, and in-
corporations, and the incorporation of the respondent, and that respondent owns and operates a rail-
road as a common carrier, as alleged in said petition, and that complainants are engaged in business and ship some of their goods as alleged.

Answer of
Lake Shore
Company.

2d. It admits that it has established and published schedules showing the rates and charges for the transportation of petroleum and its products in barrels upon its railroad in car-load lots and in less than car-load lots and in bulk in tank cars, as alleged in the complaints numbered 1 to 4, both inclusive, in said petition; but it denies that said rates and charges for less than car-load lots or for the transportation in barrels in car-load lots are excessive, unjust, or unreasonable, or that said rates and charges, or any of them, constitute or are an unjust or unreasonable preference and advantage to the traffic in car-load lots, or that said rates and charges constitute and are an undue and unreasonable preference and advantage to said traffic in bulk in tank cars, or an undue and unreasonable prejudice and disadvantage to the said traffic

in car-load lots in barrels. On the contrary, it alleges that the rates aforesaid are just and reasonable, and are fixed and adjusted fairly and equitably; that the circumstances and conditions under which such transportation is made in barrels in less than car-load lots, in barrels in car-load lots, and in tank cars are essentially dissimilar and unlike, and warrant and justify the difference in rates and charges which has been made in the tariffs of the respondent.

3d. It admits that it has established and published a schedule of rates and charges, as alleged in the 5th complaint in said petition, and that it has provided that a minimum car-load in barrels shall be sixty barrels, and alleges that the rates and charges for less than car-load lots are fixed and established by the tariffs and schedules, a copy of which is attached to said petition, and not other or different.

It alleges that the capacity of respondent's cars, in which said commodities are transported in barrels, is ample for the proper loading and transportation of sixty barrels and upwards, and that, if properly loaded, the placing of some of the barrels upon others does not produce leakage or damage to the barrels.

It denies that the regulation fixing sixty barrels as a minimum car-load is unjust or unreasonable, or that the charge per barrel at less than car-load rates on the full floor capacity of the car, when that is less than sixty barrels, is excessive, unjust or unreasonable.

4th. It admits that it has established and published a schedule of rates and charges for the transportation of petroleum and its products in bulk in tank cars, as averred in the 6th complaint in said petition, and that it transports a large quantity thereof at the said rates in tank cars. It alleges that it does not now and never has owned and supplied to any shipper any of such tank cars since the year 1880, or the apparatus, facilities, and appliances needful to unload said commodities transported and to be transported in said tank cars; and that none of the complainants has ever applied to or requested this respondent to furnish such cars, or such apparatus, facilities, or appliances for their use; nor has respondent refused to furnish the same; that all tank cars hauled over respondent's road have been furnished by shippers who own and maintain the same, and the facilities, apparatus, and needful appliances for loading and unloading the same; and that respondent has allowed to such shippers for the use of such tank cars a reasonable sum, viz., a mileage of three-fourths of a cent a mile for each mile each such car is hauled over respondent's road by this respondent; and is, and ever has been, ready and willing to afford said complainants the same facil-

ities, and upon the same terms receive and haul tank cars for them and transport for them therein petroleum and its products in bulk, and has never refused to do so.

It denies that the less amount it charges for such transportation in tank cars in combination with said mileage allowance constitutes or is an undue or unreasonable preference and advantage to the said traffic in bulk in tank cars over the said traffic in barrels, or is an undue and unreasonable prejudice and disadvantage to said traffic in barrels.

5th. It admits, in answer to the 7th complaint contained in said petition, that the Standard Oil Co. is a corporation engaged in business, and ships said commodities in tank cars, as alleged; and that said Standard Oil Co. also ships over respondent's railroad, from Cleveland to places within and without the State of Ohio, petroleum and its products in barrels in car-load lots and in less than car-load lots. It admits that the several schedules of rates and charges attached to said petition are those referred to in said petition, and are correct and true, and that petroleum and its products are, by the classification adopted by this respondent and in force on its road, classed as third-class freight and charged accordingly upon a computation of four hundred pounds for each barrel when transported in barrels in less than car-load lots.

The respondent denies each and every allegation in said 7th complaint contained which is not herein specifically answered or admitted.

And respondent prays that the petition may be dismissed.

The defendant has established and published a schedule of rates and charges for the transportation of petroleum and its products in car-load lots in barrels, in less than car-load lots in barrels, and in tank cars from points to points named in the complaint at the rates therein specified. According to these schedules, it is provided that a minimum car-load in barrels shall be sixty barrels.

Statement of
facts found.

There are as many as twenty or more different kinds of oils produced at Cleveland. These oils are divided into two general classes, namely, illuminating oils and lubricating oils. The bulk of lubricating oils is worth in the market at Cleveland from 25 to 75 cents per gallon according to quality, and illuminating oils are worth in the same market from 7 to 11 cents per gallon according to quality. There is a very large market for lubricating oils in Kansas, Nebraska, and other northwestern States, though these oils are also shipped in large quantities to other portions of the country. The illuminating oils find a general market in this country. Lubricating oils are used chiefly in the late spring and during the

warm weather in the summer and early fall, and illuminating oils are used principally in the winter and during the cold weather. Shipments of these oils are made chiefly at and for the seasons when they are most used, respectively.

Cleveland, Ohio, a station on the line of defendant's railroad, situated upon Lake Erie, is the initial point of shipment of nearly all the petroleum oil and products thereof carried on defendant's road. The quantity of such oil and products shipped over defendant's road in a westerly direction from Cleveland is at the rate of eight hundred thousand barrels annually, and eastward about six thousand barrels annually. Nearly all of this oil and its products are refined and manufactured at Cleveland. Petroleum and its products herein referred to are, by the classification adopted by the defendant and in force upon its line of railroad when transported in barrels in less than carload lots, classed as third-class and charged accordingly upon a computation of four hundred pounds weight for each and every barrel. When shipped in carload lots, whether in tanks or in barrels in stock-cars, it is practically sixth-class.

The Standard Oil Company is a corporation organized under the laws of the State of Ohio and has its principal office in the city of Cleveland, in said State, and is engaged in the business of refining, manufacturing, and dealing in petroleum and its products on an extensive scale. It ships these commodities, to a large extent, in tank-cars from the said city of Cleveland to places that are without the State of Ohio at the rates prescribed in defendant's schedules for tank-cars. About eighty per cent of said Standard Oil Company's west-bound and less than three per cent of its east-bound shipments over defendant's road, are in tank-cars furnished by said Standard Oil Company, which also furnishes its own facilities and appliances for loading and unloading. The mileage allowed by defendant to all shippers furnishing tank cars or stock-cars for shipments of oil upon its road in carload lots is three-fourths of one cent per mile per car for the use of these cars. This is the usual mileage paid by the railroads for the use of cars belonging to others. All of said tank-cars after being unloaded at their destination, are returned as a rule to Cleveland, empty, by the defendant, and the mileage of three-fourths of a cent per mile is paid on such return, as is usual in other cases.

The petitioners, Scofield, Shurmer and Teagle, the Excelsior Oil Company, and J. W. Fawcett, three of the complainants, also ship oil and its products, in part, over defendant's road to some extent in tank-cars owned and furnished by themselves, and they are allowed the same mileage therefor

as above stated, and said tank-cars are likewise returned empty and mileage paid on said return as aforesaid. From many points, but notably Chicago, the chief point to which oil is shipped from Cleveland, the stock-cars have return loads a considerable portion of the time. The other petitioners own no tank-cars.

Oil shipped in bulk in tank-cars or in carload lots in barrels is loaded and unloaded in each instance by the shipper and consignee, and the carrier pays the switching charges in order to obtain this freight. Oil transported in less than carload lots is loaded and unloaded by the railway company. The weight of an empty oil barrel in summer when dry is 63 pounds; in winter it is 65 pounds. The average weight of oil in each barrel would be, if the barrel were full, about 335 pounds; but as there is some space allowed in each barrel for expansion, the usual average rate of oil in a barrel is estimated at 325 pounds. Bulk oil is usually unloaded from the tanks at the stations into receiving tanks, but occasionally is unloaded by pipes into barrels. The defendant provides no such receiving tanks at its stations. The Standard Oil Co. has receiving tanks at the stations named in the schedule thereof mentioned in the complaint and at other points of importance, generally, where it does business; and these receiving tanks are furnished and maintained at its own expense and upon its own premises. Oil in barrels, whether in carload lots or in less than carload lots, is transported over defendant's road westwardly exclusively in cattle and stock cars. Oil in tank-cars is rated at 315 pounds per barrel.

The average weight of a tank-car is 22,100 pounds, which, with the average of ninety barrels, that being the lowest minimum hauled in tank cars on this road, makes 28,350 pounds, or a total of 50,450 pounds, for which the defendant receives from Cleveland to Chicago, a distance of 357 miles, \$34.20, being at the rate of \$1.36 per ton. The average weight of a stock-car is 21,046 pounds, which, with sixty barrels of oil, that being about the average carriage, weighing 24,000 pounds, makes a total weight of 45,046 pounds, and the earnings upon such a car from Cleveland to Chicago over defendant's road is \$30, being \$1.33 per ton. The tank-car, taking the gross weight of the car and the oil, pays slightly more to the defendant per ton than the stock-car with the full load. The average number of barrels on west-bound shipments of oil from Cleveland over defendant's road in stock-cars is 61, but on east-bound shipments the number per car runs more than this, and sometimes reaches as much as eighty barrels per car. The average number of barrels of oil transported in a tank-car is about ninety-six. The smallest of these tank-cars

carry about ninety and the largest about 120 barrels per car and they are constantly being increased in size.

The complainant's aggregate shipments west-bound over the Lake Shore road are at the rate of 36,000 barrels annually, and east-bound about 3200 barrels annually. Between April 5, 1887, and October 1, 1887, the complainant's shipments of oil over the several roads from Cleveland were distributed as follows:

Pennsylvania.....	54.7	per cent.
C. C. C. and I.....	18.7	"
Lake Shore and Michigan Southern.....	15.8	"
New York, Pennsylvania, and Ohio.....	10.8	"

More than one fourth of the shipments made by those of the petitioners owning tank-cars were made over the Pennsylvania railroad in their own tank-cars. The oil rates upon all the railroads from Cleveland to Chicago are the same.

During the period between April 1 and October 1, 1887, the Standard Oil Co. shipped over defendant's railway in less than carloads in barrels 9824 barrels; in carloads in barrels 75,075, and in tank-cars 319,860 barrels. About thirty-five per cent of these shipments by the Standard Oil Co. in barrels was made to Chicago as compared with its shipments in tanks. During this period the Standard Oil Co. shipped its 75,075 barrels in 1226 car loads in stock-cars and its 319,860 barrels in 3579 tanks, while during the same period the independent refineries shipped 4,633 barrels in 55 tanks in tank-loads. The total number of barrels shipped by the Standard Oil Co. during this period over defendant's road appears to have been 395,919 barrels. During the same period all the other shippers shipped over defendant's road in less than carload lots 8346 barrels. The oil shipped in barrels out of Cleveland during this period in less than carload lots appears to have been an average of between sixteen and seventeen barrels per car west and thirteen and four-fifths barrels per car east.

Since the business of refining oil at Cleveland commenced the business of defendant has changed very much. About ten years ago the volume of its business was east-bound and the returning cars to the west were largely empty. There was very little in the way of loads for stock-cars. The stock-cars were thus practically used and nearly altogether for oil. Now the conditions of shipments are largely reversed. East-bound shipments of live stock on defendant's road are greatly less than they were then, and this decrease has been existing since 1879. In 1879 the shipments from Chicago were 279,-

058 tons over defendant's road; in 1880 it was 81,881 tons; in 1881 it was 62,057 tons; in 1882 it was 202,740 tons; in 1883 it was 208,167 tons; in 1884 it was 176,530 tons; in 1885 it was 189,530 tons, and in 1886 it was 193,547 tons. Taking the years 1879 and 1886 by way of comparison and it shows a decrease of 85,511 tons or 7,000 cars of live stock from Chicago alone. Besides oil there has also of recent years been an immense traffic developed in west-bound freights over defendant's line in coal and coke.

While it is true that there has been a considerable falling off in the live-stock shipments east over defendant's road in the last ten years, yet still this is a large business. There is enough of it, taken in connection with other freight, such as is usually shipped in stock cars, to furnish return loads to defendant's stock cars a large portion of the time on their return trips from Chicago to Cleveland. On the other hand, it does not appear that there are any return loads of freight from Chicago to Cleveland in tank cars.

When oil is shipped in barrels in less than carload lots, there are but few articles that can be placed in the same car with it. Any other freight placed in the same car must be such as will not absorb the smell of the oil or be damaged by its leakage. There are four handlings of freight when oil is shipped in barrels in less than carloads. It is unloaded on the platform; it is loaded on the car and goes forward as way freight; it is handled at the different stations on the platform when taken from the train, and then from the platform to the team. A separate receipt, a separate bill of lading, and a separate way bill have to be made out for each barrel if shipped to only one consignee, and where there are several shipments all in a car in less than carload lots there is as much clerical work in the case of each shipper and each consignee as there would be in the case of only one shipper and one consignee for an entire carload. A carload of oil can go forward on any train, but is generally sent on a through train. Less than carload lots are always shipped in way freight trains, which stop generally at every station along the road.

The Standard Oil Co. has stock cars of its own, as well as tank cars, which are used in the defendant's business, and upon which defendant pays a mileage rate, as above stated. Whether any of the petitioners have such stock cars, is not shown by the evidence. The average oil train on defendant's road consists of thirty stock cars or tank cars. The weight of oil is based on the standard of six and one half pounds for refined oil and five and three fourths pounds per gallon for naphtha and gasoline, and seven pounds and up-

wards per gallon for lubricating or black oil. It does not appear, from the evidence, that any of the complainants have made any demand on the defendant for tank cars to transport their oil. No shipper seems ever to have made such demand upon the defendant until very recently, and, as we infer from the evidence, since the filing of this complaint.

The crude capacity of the petitioners Scofield, Shurmer, and Teagle is about 250,000 barrels a year. Their daily capacity is about 1200 barrels. The Standard Oil Co. is by far the largest refiner and shipper engaged in this business at Cleveland, according to the evidence before us.

The evidence shows that the production of these oils can be made at a much less cost by a large refiner, having a capacity of one thousand barrels per day, or more, than by a small refiner, having far less capacity. This difference is from one half to three fourths of a cent per gallon.

None of the petitioners have the capacity of making these oils at this minimum cost except Scofield, Shurmer, and Teagle. The Standard Oil Co. has the capacity to make, and does make, these oils at this minimum cost. Shippers of oils in barrels, carload lots, cannot compete successfully as against shippers in tank cars at the rates furnished by defendant to the principal points reached by its lines in the States of Illinois, Indiana, and Michigan.

The refineries are located at Newburgh, a suburb of Cleveland; and, when a stock car is furnished to them to be loaded with barrels of oil, it takes five days, on an average, for it to be loaded and returned to the defendant. This delay is caused by the switching over the Cleveland & Pittsburg railroad, an opposition line. Oil in barrels in less than carload lots is brought by the shipper to the oil sheds of the defendant, and is loaded on the cars at once. Stock cars furnished by the defendant to the Standard Oil Co. are loaded by that company at its refineries and returned to the defendant in from 24 to 48 hours. The differences in the rates of defendant upon these shipments are not based on any of these considerations.

Up to the time that the act to regulate commerce went into effect, the rate of the defendant on barrels of oil in carloads was 60 cents per barrel from Cleveland to Detroit, and on less than carloads 70 cents per barrel. The present rate is 30 cents per barrel on carloads, and on less than carloads 64 cents per barrel. Relatively, much the same differences on oil in barrels in carload and in less than carload shipments are made to other points. The ground assigned for this by the carrier is that prior to April 5, 1887, it had been doing this business "in a haphazard sort of way,

and after that it was necessary to make rates harmonious with the various interests and commodities along its road." It is also claimed by the carrier that this change was made necessary by the fact that it had been carrying oil in barrels in less than carloads too low prior to April 5, 1887.

Small shipments of oil, less than carload lots, are usually shipped by the defendant in single-decked stock cars. As a rule, the defendant always ships promptly oil in less than carloads the day it is received, if it has cars, no matter how small the number of barrels may be; but if it has not enough cars, then on the next day. It takes about twice as long to get freight through to destination from point of shipment in less than carloads than in carloads.

The reasons assigned by the defendant for having no tank cars of its own are, in substance, that if it owned such tank cars the party who does the largest shipping over its road (the Standard Oil Co.) would give it no work for such tank cars, and then it would be dependent on other shippers who get their crude oil over other roads than the defendant's, and in consequence give their shipments back to the companies to get their crude oil, and therefore that the defendant would have its equipment of tank cars on its lines for six months of the year doing nothing.

The crude oil used by the refineries at Cleveland is brought from the oil region of Pennsylvania. The estimate is that from 2,400,000 barrels to 3,000,000 barrels of this crude oil is thus brought from the oil fields of Pennsylvania annually to Cleveland to be refined. The greater portion of this crude oil is brought to Cleveland by a pipe line owned and controlled by the Standard Oil Co. A portion of this crude oil is brought from the oil fields to Cleveland by the Pennsylvania system of roads. The defendant has a railway line from Cleveland to Oil City, in the oil region of Pennsylvania, but for the last five years or more has not been engaged in the business of hauling crude oil from the Pennsylvania oil fields to Cleveland. All of the petitioners, except the Brooks Oil Co., receive their crude oil chiefly from the pipe line. The Brooks Oil Co. receives its crude oil from the vicinity of Parkersburg and Oil City entirely by tank cars of the Valley road. There has been a considerable demand upon the defendant for shipments of crude oil from the Pennsylvania oil fields to Cleveland. It makes a rate for this of 25 cents per barrel, while the pipe line only charges 20 cents a barrel. It was conceded by petitioners' counsel upon the hearing, that this pipe line is not a common carrier.

The territory east of Cleveland receives its supply of refined oil chiefly from the east. There are refineries at Oil City,

Buffalo, Philadelphia, Pittsburg, and New York. There is a pipe line from the oil regions of Pennsylvania to the seaboard, and it is owned and controlled by the Standard Oil Co.

The shipments west over defendant's line in stock cars are largely made up of anthracite coal and pig-iron from Buffalo, anthracite coal from Erie, and coke from Ashtabula. The shipments of these classes of freight over it, west, are so large that they often exceed the capacity of the defendant to furnish the requisite cars for their transportation.

Questions
arising upon
the complaint.

The questions arising upon this complaint (are several in number) and may be stated briefly and substantially in the following order:

1. The difference between barrel rates in less than car-load quantities and barrel rates in car-load lots.

2. The difference in rates between oil in car-load lots in barrels and oil in car-load quantities in tanks, and whether the combination of the difference in favor of tank-car rate with the mileage allowed the shipper for the use of the tank cars, operates to produce a prejudice and disadvantage to the shipper of oil in barrels in car-load lots or less than car-load lots that is obnoxious to the statute.

3. Whether or not it is the duty of the carrier to furnish tank cars as a part of its equipment which can be enforced by order of the Interstate Commerce Commission or upon its recommendation under the act to regulate commerce.

I. Reasons that are substantial exist for making the rate lower per barrel in carload lots than in less than carload quantities. The cost of service is very considerably less in the case of shipments in carload lots than in less than car-load quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The

Reason for
lower rate for
car-load lots
than less than
car-load quan-
tities.

shipment by the car-load goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way-stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the way-bill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than carload quantities. There is but one collection of charges for freight. All of these reasons apply with the same force whether the shipment be in a tank or in barrel shipments in carload lots.

Where the shipment is made in less than carload quantities, a separate receipt or bill of landing has to be given to every shipper for his parcel. A separate entry for every

item has to be made on the way-bill. The shipment is by a local freight train, which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a carload shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation. There is also a considerable element of danger attending the handling of barrel oil in small lots which are unloaded by the carrier and stand in the local station-houses, whereas carload lots are usually unloaded by the consignee at a distance from the depot building and immediately removed from the premises of the railroad company. All these facts show that a reasonable difference can and should justly be made between shipments in carload lots and less than carload quantities. A reason, additional to these named, is urged by the carrier and sustained by the evidence in the present case. It is that there are very few articles of freight that can be shipped in the same car with oil in barrels. The force of this is seen at a glance, and it renders this a service that is phenomenal in its expensiveness to the carrier. As thus transported, oil in barrels less than carload lots is not ordinary but extraordinary freight. Taken in connection with all the features of this traffic, it is indeed an exceptionally expensive service on the part of the carrier; and, high as the rates are on oil in barrels less than carload lots,—and we must say that they are very high, almost so high that it seems to us that they are in their nature prohibitory,—yet we cannot, upon all the evidence say that they are unreasonable or excessive. This result, however, arises from the peculiar character of the freight stated. It is proper to say in this connection that the defendant, as a carrier, performs this service promptly at an exceptionally large cost of outlay, and that the rates charged for it cannot fairly be measured by the standard of other freights were substantially different conditions, to a very remarkable extent, exist.

The extraordinary differences made by this carrier between barrel shipments in carload lots and less than carload lots, which we have had occasion to consider and have sustained, require that we should notice this subject at more length in its general features. Since the act to regulate commerce went into effect, carriers have generally reduced their rates in shipments in

Same—Difference should not be too great.

carload lots considerably, and have made these rates lower than they were prior to April 5, 1887; while, on the other hand, shipment of articles in less than carload lots have, as a rule, shared no such corresponding reduction, and have in many instances been made higher. By means of this, large shippers have advantages in rates over small shippers,—if not to the same extent as they did by rebates and special rates before the enactment of the act to regulate commerce, yet still to a very large extent. There is evidence in this case strongly tending to show that the defendant is no exception to this rule. Strong reasons exist, and these we have sustained, why the car-load as a unit should be upheld; but there are equally strong reasons why carriers should not make the differences so great between shipments in carload lots and less than carload lots, and why they should recognize equitable considerations in a subject of such great importance. The business of the country renders it necessary that a vast majority of the shipments of freight must be made in less than car-load quantities; and rates amounting to a penalty upon this class of freight, and so high as to be almost prohibitory in their nature, cannot be sustained. These are the views of the Commission upon this general subject, and it would be well for every carrier subject to the act to regulate commerce to forthwith consider its tariffs in this respect, and to carefully determine whether it has not gone too far in the differences it has made between carload lots and less than carload lots before the Commission shall take further action upon this subject.

II. The charge made by the carrier, as shown by the evidence in this proceeding, is not the same for a car-load, whether it be in barrels or in tanks, without regard to weight. In this respect it differs to some extent from other cases that have been before us. It also differs from other cases we have considered, in this: that it is admitted that there is no return load in tank cars from Chicago to Cleveland. The tank cars, after transporting the oil from Cleveland to Chicago and to other points named in the complaint, as shown by the evidence, are brought back empty to Cleveland by the carrier. These tank cars are not owned by this railroad company. They belong in every instance to the shipper, who is the refiner of the oil. Several of the petitioners own these tank cars in small numbers. The Standard Oil Co. owns them in large numbers. Whether the oil is shipped in car-load quantities in tanks or in barrels, it is loaded by the shipper and unloaded by the consignee. The average number of barrels of oil hauled in a tank car is ninety-six barrels

Difference in
charge for car-
load in bar-
rels and in
tanks.

on west-bound freight from Cleveland, and in an ordinary stock car the number of barrels is sixty-one to the same points. Besides its tank cars, the Standard Oil Co. owns a large number of stock cars, which are used by the defendant in this business, and for which it pays the Standard Oil Co., and to others who furnish such stock cars, three-fourths of a cent per mile going to and returning from destination. This is the usual rate paid by railroads in this country for the exchange of cars. It appears from the evidence that the oil in a barrel in barrel shipments is rated by the carrier at 325 pounds of oil, while a barrel of oil in tank-car shipment is rated at 315 pounds per barrel. We do not understand why this difference should exist, though no particular importance appears to attach to it either way, and certainly not in the conclusions that we have reached.

The charges made by the defendant in carload lots in tank-cars per barrel and in carload lots in barrels per barrel are, from Cleveland:

	Carload lots in bulk in tank cars, per barrel.	Carload lots in bar- rels, per barrel.
To Chicago, in the State of Michigan.....	\$0 38	\$0 50
To Detroit, in the State of Michigan.....	22	30
To Buffalo, in the State of New York.....	25	34
To Kalamazoo, in the State of Michigan....	35	46

The table on the following page shows the relative earnings and rates on oil shipped in barrels and in tank cars from Cleveland, Ohio, to various points named on the Lake Shore & Michigan Southern railway in car-load lots:

It is thus seen from the subjoined table in the note that in every instance a large difference is made in the rate per barrel in favor of oil in tank-cars as against oil in barrels in carload lots. This, too, when, as the evidence shows, there is frequently return freights from Chicago to Cleveland for stock-cars and no such return loads for tank-cars. There is no just and substantial ground for this difference, so far as we can see. By this arrangement the carrier hauls in one tank-car ninety barrels of oil as the lowest minimum and in a stock-car sixty barrels as the minimum. Besides the large differences made in favor of oil per barrel in the tank-car as against oil per barrel in the stock-car, each being in direct competition, whenever there is a return load for the stock-car the actual revenue would be proportionately greater to the carrier upon the entire transaction from the stock-car than from the tank-car. The preference thus given to oil shipped in tank-cars as against oil shipped in stock-cars in carload

Relative earn-
ings and rates
on oil shipped
from Cleve-
land.

Preference
given oil in
tank cars un-
lawful.

* *Statement Showing the Relative Earnings on Rates on Oil Shipped in Barrels and Tank Cars from Cleveland, Ohio, to Various Points on Lake Shore and Michigan Southern Railway.*

From Cleveland, Ohio, to—	Rates per barrel.		Freight Earnings per car.				Rates per 100 pounds.			
	In tank-cars		In tank-cars		In tank-cars.		In tank-cars.		Differences.	
	In box or stock-cars.	Mileage allowance not deducted.	Mileage allowance deducted.	In box or stock-cars.	Tank-cars in excess when mileage is not deducted.	Tank-cars in deficit when mileage is deducted.	Mileage allowance not deducted.	Mileage allowance deducted.	In box or stock-cars.	Box-car rate in excess of tank-car rate, mile. age included.
Chicago, Ills.....	50c.	\$34 20	\$28 84	\$30 00	\$4 20	\$1 16	12.08c.	10.17c.	12.82c.	Box-car rate in excess of tank-car rate, mile. age deducted.
Buffalo, N. Y.....	34c.	22 50	19 75	20 40	2 10	65	7.94c.	6.98c.	8.72c.	1.76c.
Detroit, Mich.....	30c.	19 80	17 13	18 00	1 80	87	6.98c.	6.42c.	7.69c.	1.27c.
Grand Rapids, Mich..	50c.	34 20	29 23	30 00	4 20	78	12.08c.	10.81c.	12.82c.	2.51c.
Kalamazoo, Mich.....	46c.	31 50	27 39	27 60	3 90	21	11.11c.	9.66c.	11.80c.	2.14c.
South Bend, Ind.....	42c.	28 35	24 30	25 20	3 15	90	10.00c.	8.57c.	10.77c.	2.20c.
Elkhart, Ind.....	42c.	28 35	24 53	25 20	3 15	68	10.00c.	8.65c.	10.77c.	2.12c.
Erie, Pa.....	30c.	19 80	18 37	18 00	1 80	37	6.98c.	6.48c.	7.69c.	1.21c.

NOTES.—The bases for computation are as follows:—

Mileage deductions are on the basis of $\frac{1}{4}$ of one cent per mile, both directions.

Weight of barrel of oil, 890 pounds.

Weight of oil in barrel, 325 pounds.

Weight of barrel oil in tank, 315.

Number of barrels of oil in box or stock-car, 60.

Number of barrels of oil in tank, 90.

lots is, we think, unlawful, and must be regarded as forbidden by the act to regulate commerce. The defendant should carry the same weight for the same price in the one car as in the other, and the rate should be made by the hundred pounds instead of by the barrel.

The element in this transaction that produces this large difference in rates is the tank. It confers an advantage upon the shipper who uses it, transporting from one-third to twice as much oil more than is shipped by the shipper in the stock-car, with but little difference in the aggregate car rate for this large excess of oil. The tank is indeed the car, but in renting it from the shipper to haul his own oil the carrier pays him for furnishing a package for the oil, charges him nothing for the increased dead weight of the tank over and above that of the stock-car, which upon an average is one thousand pounds, and pays him rental for hauling the empty tank-car back to him as part of the transaction. The shipper of oil in carload lots in barrels pays for the full weight of the barrel in every instance, as well as the oil, and furnishes the barrels himself, and if his barrels are hauled back to him he has to pay for that service as upon other freight. The inequalities of the transaction are very great, and they are all on the side of the shipper of oil in tanks. The business of dealers, whether it be by shipments in tanks or in carload lots in barrels, is in direct and actual competition. It is obvious that where the railroad company does not furnish tanks one shipper cannot compete in all respects upon equal terms with another shipper who furnishes tanks for the transportation of his oil, unless he also furnishes tanks. The method of shipment of oil in tank-cars seems now to be fully established, though very few of the railroads of the country own tank-cars. The Pennsylvania R. Co., it appears, does own such tank-cars. The use of tank-cars in the shipment of oil is of recent origin. It seems to be done chiefly by a few independent companies who own tank-cars furnished to shippers for this purpose, but in a few instances they are owned by the shippers themselves.

Tank car as element in the transaction.

The transportation of petroleum oils being a special traffic as we had occasion to observe in the case of *Rice v. The Louisville & Nashville R. Co.* and others [s. c., 33 Am. & Eng. R. R. Cas. 560], it is properly the business of the carrier to supply the rolling stock for the freight he offers or proposes to carry, and if the diversities and peculiarities of the traffic are such that this not always practical, and consignors are allowed

Carrier must make same rate for tank and barrel shipments.

to supply it themselves, the carrier must not allow his own deficiencies in this particular to be made the means of putting at an unreasonable disadvantage those who make use in the same traffic of the facilities he supplies. There appears to be no law that prevents a carrier in the course of his business from arranging with the shipper to furnish cars for the shipment of his own goods at terms agreed upon between him and the carrier, but in every such transaction the carrier, at his peril, must see to it that neither directly nor relatively must a better rate be given to such shipper than to others engaged in the same business, and making shipments of the same kind of goods, who are dependent on the carrier for cars. From this it follows, as we decided in Rice's case, that this carrier must make the same rates on oil, whether shipped in carload lots in tanks or in carload lots in barrels. The carrier, of course, has the right to charge for the weight of the barrel as part of the freight.

III. Among other relief sought, we are asked to require this carrier to furnish tank-cars for petitioners and the public generally in the shipment of their oils, and the question arises whether, under the statute, we have this power. The power was supposed by the petitioners' counsel, in the argument before us, to be found in the last subdivision of section 3 of the act to regulate commerce. That subdivision is in these words:

Request that carrier be compelled to furnish tank cars.

Same—Provisions of act.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

A careful consideration of this provision of the statute has brought us to the conclusion that it refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers. The term "facilities," as here used, does not embrace car equipment for the origination of and transporting of freight along the line of the carrier in the sense in which it is here contended for by the petitioners.

The power of the Commission to order the defendant to

furnish tank-cars for the shipment of oil over its line was also supposed by the able and learned counsel for the petitioners to be found in the first section of the act to regulate commerce. The term "instrumentalities of shipment or carriage," as found in the first section of the statute, of course includes cars, but they are such cars as are provided by the carrier or used by it in interstate commerce, and the statute, nowhere clothes the Commission with power to determine what kind of cars the carrier shall use for this purpose and require the carrier to place upon its line for use in this business such kind and number of cars as the Commission may decide will constitute a proper and necessary equipment of car service. The duty of every such carrier is none the less obligatory at common law, and by its charter to furnish an adequate and proper car equipment for all the business of this character it undertakes and advertises in its tariffs it will do. The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceedings of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings. This is apparent from the twenty-second section of the statute, in which it is declared that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by any statute, but the provisions of this act are in addition to such remedies." It is also apparent from the enumeration of powers conferred upon the Commission in the statute. The statute contains no provision requiring the carrier to keep its road-bed, bridges, and trestles at all times in good repair for the safe transportation of persons and property, nor any provision clothing the Interstate Commerce Commission with the power of requiring the carrier to do these things, but it is none the less obligatory upon the carrier by the common law and by its charter to do so. Other illustrations readily occur, but it is unnecessary to enumerate them.

Commission cannot compel carrier to furnish particular kind of cars.

The reference to "instrumentalities of shipment or carriage in the first section of the statute proceeds upon the assumption that every railway carrier will, from self-interest, as well as in obedience to the law, perform the plain duty to itself and to the public of providing proper and adequate car equipment for all the reasonable needs of its business. The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever

in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute.

The law-making power has not taken upon itself the responsibility, nor has it clothed the Interstate Commerce Commission with the power and the responsibility, of directing a carrier to supply itself with any particular equipment or cars, or, in fact, with any equipment or cars at all, for the transportation of freight over its line. The responsible duty of supplying itself with a sufficient and proper equipment of cars is left by the statute to rest with the carrier, to whom alone it rightfully belongs, and if the carrier fails to do this in such a manner as it should, whereby others are injured or wronged, then that the carrier shall be liable for all the damages which result from such failure.

The provisions of the statute in this respect are explicit. If the carrier is so far unmindful of its plain duty as not to furnish a reasonable and proper equipment for the use of shippers over its line, and does this as a "device" to give one shipper who furnishes his own cars an unlawful preference in the rate, the carrier incurs a severe penalty provided by the statute for enforcement in the courts. It is also liable for the whole amount of damages sustained in consequence of the violation of the statute, together with a reasonable counsel or attorney's fee to be enforced in the courts, and the violation of the statute, so far as the rate is concerned, can be corrected by complaint to the Interstate Commerce Commission, whose duty it is to notify and order the carrier to cease such unjust discrimination and to give equal rates to shippers. In these several modes of procedure the statute has provided ample remedies for the enforcement of this duty on the part of the carrier in different tribunals without clothing either of these tribunals with the power of directing the carrier what equipment or cars it shall furnish for the transportation of freight over its line. The wide field covered by these several remedies, and the sufficiency of them in each instance, shows that this whole subject must have undergone the most thorough and mature consideration of Congress in the enactment of the statute.

Failure of carrier to furnish equipment as a "device."

IV. Another phase of the statute is presented by this

proceeding, namely, that of the shipper furnishing in part his own cars. Long prior to and at the time the act to regulate commerce was enacted there was a prevailing general custom and usage among railroads of the United States of renting cars from each other and from mere car-furnishing companies, paying rent for the use of such cars. A like custom and usage then prevailed and has since of the carrier paying rent to the shipper for cars occasionally furnished by the shipper for the transportation of his own goods. This amount in each instance then was, since has been, and is now three-fourths of a cent per mile. It is part of the legislative history of the country that Congress had pending before it for many years in various forms the general subjects which were afterwards enacted into the act to regulate commerce, and that all these matters were made the subject of lengthy and thorough examination by committees of Congress. We must, therefore, presume, as we heretofore have done, that Congress must have known at the time the statute was enacted of the existence of each of these customs and usages on the part of carriers for obtaining cars, and neither of them are forbidden by the statute. If the carrier had been forbidden by the statute from transporting freight over its line otherwise than in its own cars bulk would have necessarily been broken and cars unloaded by every railroad at the end of its line and there re-loaded into the cars of its connecting line, resulting in greatly increased delays and expense in the transportation of freight; and we can well understand why the statute contains no provision requiring the carrier to transport freight only in its own cars.

Shipper furnishing cars—
Rental by carrier.

The rule upon this subject, to which we have uniformly and steadily adhered, has been that the rate charged by the carrier must not be affected by either one of these customs and usages, but must be the same on all cars operated over its line, whether furnished by the carrier or by others, just as though no custom or usage existed whereby the carrier obtained any of its cars from shippers or from car companies. The rate of three fourths of one cent per mile paid for the exchange of cars has seemed to us, upon evidence repeatedly taken upon this subject, a reasonable allowance for the car's service, and has been the same very generally in all parts of the country. We have decided in other cases, as we do now in this proceeding, that the carrier at his peril must see to it in every transaction in which the shipper furnished the car for the transportation of his freight that such shipper shall not thereby receive a lower rate than other shippers who use and have to use

Rates must not
be affected by
custom.

the cars furnished by the carrier in the shipment of their freight.

The violation of the statute by which higher rates are charged on car-load lots in barrels than in tank does not appear to have been accomplished by any mere "device." It seems to have been a lower charge on oil in tanks than in barrels, made directly without any "device" whatever, applying as well to the tank cars of the petitioners as to the tank cars of the Standard Oil Co. It was seriously and earnestly defended at the hearing before us by the defendant, and upon the testimony of learned and experienced witnesses, one of whom was its general freight agent, in whose judgment and intelligence the defendant had a right to rely in making these rates. That the error of the defendant in this respect resulted from a miscalculation of the elements that entered into the service of the two respective modes of shipment is apparent, and although, as we have said, it was a violation of law, yet upon the evidence it does not appear to have been accomplished with that intent, or by any "device" to reach that result. The evidence is strong and uncontroverted that while this result was occurring the defendant's agents and officers, under the repeated admonitions of its president, "to live up to the law and abide by it in all respects," were endeavoring to do so and believed they were doing so. In a business involving so many elements of complication, as that of transporting freight over railroads in cars wholly different from each other, mistakes of judgment and errors of calculation may occur even under the best administration without any intent to violate the law, and this we find is a case of that description. The statute is one that may be violated without any "device" on the part of the carrier, and it is equally true that the ingenuity of man cannot invent a "device" by which a carrier, subject to its provisions, can give an unlawful preference without incurring the penalties and remedies provided by this statute. The failure of the defendant to furnish tank cars of its own appears to have resulted from its own business considerations entirely. As we have no jurisdiction to order or recommend the defendant to furnish tank cars, we forbear making any comments upon the reasons it has assigned for not furnishing such tank cars for the transportation of oil over its line, and simply state these reasons because they arise as part of the evidence and were offered to negative the idea that the defendant failed to furnish such tank cars on account of any "device" to give one shipper a preference over others.

No intention or device on part of defendant to violate the law.

To enumerate the conclusions to which we have arrived in this proceeding we state :

1. That so much of the complaint as alleges unjust discrimination in favor of oil shipped in tank cars is sustained, and that it is the duty of the defendant, and it must give the same rates on oil shipped in barrels in car-load lots that it charges upon oil in tanks. Conclusions enumerated.

2. That so much of the complaint as alleges unjust discrimination between oil shipped in barrels in car-load lots and less than car-load lots is not sustained.

3. That so much of the complaint as seeks an order from the Commission requiring the defendant to furnish tank cars for the transportation of oil for the petitioners and the public is not sustained.

The order of the Commission is that the defendant The Lake Shore & Michigan Southern R. Co., must from and after the receipt of this notice, charge the same rates on oil shipped in barrels in carload lots in stock-cars and other cars that it charges upon oil in tanks—by the pound and not by barrel.

See *Rice v. Louisville & Nashville R. Co.*, 33 Am. & Eng. R. R. Cas. 560.

BUSINESS MEN'S ASSOCIATION OF THE STATE OF MINNESOTA

v.

CHICAGO & NORTHWESTERN R. CO.

(Interstate Commerce Commission, July 20, 1888.)

Interstate Commerce—Freight Rates—Newly Settled Country.—In an application by merchants, and other business men, complaining of excessive freight rates between St. Peter, Minnesota, and Pierre, Dakota, it appeared that the line of the Chicago & Northwestern R. Co. between these towns was constructed through a sparsely settled country, that the volume of traffic was small, that the company was obliged to bring coal a distance of over 400 miles for use as fuel in running its trains, thus entailing considerably larger cost in transportation, that the line is subject to snow blockades, and that the expense of keeping the road in condition and open is greater in proportion to the business done than upon any other part of the company's system. *Held*, that in view of these facts the rate per ton per mile must decrease for a greater distance, while the total aggregate charge increases, is inapplicable.

PETITION by the Business Men's Association of the State of Minnesota against the Chicago & Northwestern R. Co. complaining that the defendant company charges freight

rates on shipments from Chicago for points beyond Janesville, Minnesota, at an unjust and unreasonable rate, the opinion sets out the pleadings and the points in issue.

J. M. Burlingame for petitioner.

W. C. Goudy for defendant.

BRAGG, C.—The petition in this proceeding avers in substance that petitioner is an association consisting of the several **Averments in** boards of trade, business men's associations, and **petition.** farmers' organizations in the State of Minnesota, and that the object of the association is to secure equal and reasonable rates of transportation of persons and property in accordance with State and national legislation.

It also avers that the Chicago & Northwestern R. Co. is a corporation duly incorporated under the laws of the State of Illinois, and is a common carrier engaged in the transportation for hire of passengers and property, and owning and operating a railroad that runs through the several States of Illinois, Wisconsin, Minnesota, and the Territory of Dakota to and from the city of Chicago, in the State of Illinois, between and through the various stations on its said line of road, including Winona, Janesville, Mankato, St. Peter, Nicollet, Newell, Sleepy Eye, Sanborn, Tracy, and Lake Benton, in the State of Minnesota, and Huron and Pierre, in the Territory of Dakota.

It avers that the defendant railway company, for its services as such common carrier in carrying merchandise of all kinds and classes from Chicago and Lake Michigan ports to stations on its line of road, as above indicated, has established and published a tariff of freights and charges which, as of right it ought to do, establishes and makes a reduced rate per ton per mile for the greater distance from Chicago, for all stations on its said line of road between Chicago, Illinois, and Janesville, Minnesota, a distance of 412 miles, while in the same tariff for a continuous transportation of the same freights, over the same line and from the same point of origination, it establishes and makes a higher through rate per ton per mile for all stations west of Janesville. In support of this last averment the petitioner sets forth in its petition a table of extracts from said tariff wherein the rates per ton per mile are figured from the rates and distances as stated by the defendant railway company for the purpose of showing the charges to be true as made in complaint.

It avers that such charges are unjust and unreasonable and in violation of section 1 of the act to regulate commerce, approved February 4, 1887, and that by such charges such common carrier gives an undue and unreasonable preference

and advantage to the several certain stations and localities along the line of its route, and to the same extent subjects the several other certain stations along its line to undue and unreasonable prejudice and disadvantage in violation of section 3 of said act.

The petition prays that an investigation of these charges may be made, and if the facts are found to sustain them, that said common carrier may be ordered to amend its tariff rates and charges so that it shall not now, nor at any time in the future, charge a higher rate per ton per mile for the longer than for the shorter haul aforesaid, and that such proportionate rates may be recommended as shall be just and reasonable and as shall prevent all undue preferences and advantages and all undue prejudices and disadvantages.

To so much of this petition as states facts alleging unjust discriminations and which are found in the first, second, and third paragraphs of the complaint, the defendant railway company demurs upon the ground that there is no provision in the Act of Congress of February 4, 1887, requiring the railway carrier to transport freight at a rate fixed by the ton and mile, as supposed in said complaint, and that said complaint shows the fact to be that the Chicago & Northwestern R. Co. does not charge or receive a greater compensation for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, and that it has fixed this tariff in accordance with the several provisions of said act. To all the portion of the complaint which avers that the charges of the railway company are unreasonable and unjust and in violation of section 1 of the act to regulate commerce or section 3 of said statute, the railway company enters a general denial and demands that complainants shall be required to make proof of these allegations.

Demurrer and denial of defendant.

The only issue presented by the petition in this proceeding is whether the rates of the Chicago & Northwestern R. Co. on its main line, extending from Chicago through Winona, Janesville, St. Peter, Nicollet, New Ulm, Sleepy Eye, Sanborn, Tracy, and Lake Benton, in the State of Minnesota, and Huron to Pierre, in the Territory of Dakota, as established, are just, fair and reasonable rates, according to the rule asserted in the petition as the correct rule, namely, that of making a reduced rate per ton per mile for the greater distance from Chicago to these stations in the State of Minnesota and Territory of Dakota, as is alleged has been done between Chicago and St. Peter, in the State of Minnesota. To the inquiry involved in this issue our findings of fact must be directed. Other collateral questions

Issue presented.

were suggested at the hearing in the evidence for the first time, but these can now be considered only so far as they bear, if at all, upon the reasonableness of the rates as tested by the above rule.

The Chicago & Northwestern R. Co. is a corporation incorporated under and by virtue of the laws of the State of Illinois. It owns and operates a large system of railroads extending through the States of Illinois, Wisconsin, and Minnesota, and through the Territory of Dakota. That one of its lines, the rates of which are involved in this proceeding, extends from Chicago, Illinois, to Pierre, in the Territory of Dakota, a distance of 781 miles. This company, for this portion of its line, has what is called a distance tariff for the State of Illinois. It has also a distance tariff for the State of Wisconsin. It also has a distance tariff for the State of Minnesota. It also has a distance tariff for the Territory of Dakota. It also has tariffs to and from all points on this line in each of the states through which it passes and the Territory of Dakota. It has a general tariff from Chicago to all points along its line extending to Pierre. The distance from Chicago to Janesville, Minnesota, is 412 miles; to Mankato, 430 miles, and to St. Peter, 442 miles.

In consequence of the combined operation of the water competition afforded by Lakes Michigan and Superior and the near proximity to each other of large and rival lines of railway, extending to and from important points on these lakes, often crossing each other, and the competition thus existing, on the one hand; and, on the other hand, the operation of the long and short haul clause of the 4th section of the act to regulate commerce, the consequence has been, as we have had occasion to find in several cases before us, the rates are grouped in a large extent of this territory along the lines of these railroads. For instance, the rates are the same at La Crosse or Winona that they are at Mankato, about two hundred miles west of La Crosse. The facts in relation to these conditions of transportation were found and considered in the case of the La Crosse Manufacturers' and Jobbers' Union *v.* The Chicago, Milwaukee & St. Paul R. Co., and also in the case of the Business Men's Association of the State of Minnesota against the Chicago, St. Paul, Minneapolis and Omaha R. Co., heard at the same time as the present case and recently decided by us. In this last-named case we also had occasion to find the facts existing in the interior section of the country adjoining that bounded upon the west by Duluth, Minneapolis, St. Paul, Mankato, and other points that might be named. Substantially the same state of facts that we there found we find again in this proceeding as to

rates existing between Chicago, Janesville, Mankato, and St. Peter, and it is unnecessary here to repeat them.

Rates are much lower in proportion to distance from Chicago to Janesville, Mankato, and St. Peter than they are west of St. Peter upon the line of this railroad, arising from the facts we have stated. Rates between Chicago, Janesville, Mankato, and St. Peter are considerably lower than the mere distance tariffs of the railroad in the States of Illinois and Wisconsin. The rates west of St. Peter on the line of this railroad in the State of Minnesota and the Territory of Dakota, by the general tariff of the railroad, are lower than they would be by the mere distance tariffs in Minnesota and Dakota. In quite a number of instances it has been developed by the evidence in this proceeding offered by complainant against the objection of the defendants and received by the Commission simply so far as it might bear upon the question of the reasonableness of the rates to stations on the line of this railroad in the State of Minnesota and in the Territory of Dakota west of St. Peter, that a lower rate might be obtained by a combination of the general tariff of the company from Chicago to St. Peter, with the addition of its local rate to the station named, than by its general tariff from Chicago to that station; and this we refer to, not as being a matter that is involved in this issue, or that can be corrected in this proceeding, and is entitled to be considered only so far now as it has a bearing, if any, upon the question of the reasonableness of these rates.

After leaving St. Peter, going west on the line of this railroad, its rates are graded according to distance. Very few of them appear to be grouped at stations. The usual and unavoidable result of this is that the aggregate of the rate, according to distance, grows progressively higher and the rate per ton per mile, instead of decreasing for the greater distance, increases to a considerable extent. Between the stations, as graded, according to distance, west of St. Peter in the direction of Pierre, the rate increases upon first-class freight in the following proportions:

St. Peter,	435 miles from Chicago.....	50 cents.
Courtland,	457 " " "	59 "
New Ulm,	469 " " "	62 "
Sleepy Eye,	479 " " "	68 "
Sanborn,	500 " " "	80 "
Walnut Grove,	518 " " "	92 "
Tracy,	525 " " "	94 "
Balaton	538 " " "	96 "
Lake Benton	560 " " "	99 "
Elkton,	573 " " "	\$1 00 "
Brookings,	590 " " "	1 02 "

Volga,	596 miles from Chicago.....	1 03 cents.
Iroquois,	644 " " "	1 15 "
Huron,	662 " " "	1 20 "
Wolsey,	675 " " "	1 20 "
Miller,	702 " " "	1 35 "
Highmore,	724 " " "	1 50 "
Pierre,	781 " " "	1 50 "

The different classes of rates as to other articles are in much the same proportion.

The rates offered in evidence in this proceeding were the tariff taking effect February 14th, 1888; the rates in force March 5th, 1888, and the tariff taking effect October 28th, 1887, afterwards discontinued, and of which notice had been given by the defendant, as provided by the statute, that it proposed to restore this tariff, to take effect March 26th, 1888. From these tariffs, tables were made and offered for our consideration by the contending parties, and we have carefully examined them, as well as the tariffs complained of.

The case of petitioner rests upon the difference of the rate per ton per mile between Chicago and St. Peter and each of the successive stations west to Pierre. This method of comparison shows, of course, a great deal higher rate per ton per mile between each of the stations west of St. Peter and extending to Pierre than exists upon the distance between Chicago and St. Peter, relatively; and it is still further heightened by taking the extreme low-cut rate of twenty cents per hundred pounds on first-class freight, which existed for a short time, from Chicago to Mankato, and adding to this the local rate west, in tables of rates furnished for our consideration by petitioner, and also in insisting upon a comparison of the rate per ton per mile on this low-cut rate of twenty cents per hundred pounds between Chicago and Mankato and the respective distances between each of the stations west from St. Peter to Pierre.

The evidence shows that defendant is obliged to bring coal from the vicinity of Chicago to be used as fuel in running its trains over its lines between Chicago and Pierre. As to the country between St. Peter and Pierre, owing to the greater distance, this entails upon the defendant a very considerably larger cost of transportation in operating that portion of its road than exists upon that part of its line between Chicago and St. Peter.

The defendant's road between St. Peter and Pierre is a new road. That portion of its road between Mankato and Tracy has been built since 1875. That part of its line between Tracy and Pierre has been built and in operation

about seven or eight years. Its main line west from St. Peter to Pierre is operated through a country sparsely settled and where the volume of business is light. There is a great falling off in the volume of business over this road west of St. Peter, going in the direction of Pierre, to what it is east of St. Peter. The towns and stations along this railroad west of St. Peter indicate to some extent its scanty population. In Rand, McNally & Co.'s Business Atlas for 1887 the population of Pierre, Sanborn, and Highmore, each, is so small as not to be given at all, while the population of Huron is 164, Walnut Grove 153, Nicollet 99, Tracy 322, Sleepy Eye 1,373, and New Ulm 3,335.

That part of defendant's railway between St. Peter and Pierre is more subject to snow blockades than the portion of it east of St. Peter. The expense of keeping the road in condition and open on the portion of the line west of St. Peter in proportion to the business done is far greater than on any other part of the road. The station expenses are higher relatively on that portion of the line in proportion to the business done, and the expense, of course, is much greater in proportion as there is less amount of traffic. So far as the evidence shows, the principal articles of freight on this portion of its road are agricultural implements, wheat, and articles of that description. It is largely an uncultivated and thinly settled country.

The defendant can charge no more than it does charge to Mankato and the group of stations east of that, on its line, on account of the charges made by other competing railroads running through the same section of country between Chicago, St. Paul, Minneapolis, and Lake Superior ports.

We find that the rates established by the defendant on its line between Chicago and Pierre are neither joint nor through rates, but are local rates. We find that these rates, owing to the causes named, are, generally speaking, reasonable rates from Chicago as far west as St. Peter. We find that west of St. Peter, and between that point and Pierre, the rates are relatively much higher such as are often usual with railway carriers in a country thinly inhabited and but little cultivated where the volume of traffic is light, and the cost of service in proportion to the business done is much greater than in more thickly settled sections of the country in which the volume of business is heavy.

The conclusions we have reached in this proceeding remain to be stated.

The comparison attempted by petitioner between the rates of this carrier on that portion of its line between Chicago

and St. Peter, on the one hand, by a constantly decreasing rate per ton per mile, and that part of its line between St. Peter and Pierre, on the other, is one that for obvious reasons cannot be sustained. The circumstances and conditions are substantially dissimilar. The rates between Chicago and St. Peter are made by this defendant, as the shorter line from Chicago, to meet the lower rates of longer competing lines for the same business. It is compelled to meet this condition of affairs in this way or else lose the business, or sustain great financial loss. Those rates are made so low, as they are by other carriers, some of which are longer lines, competing with the defendant between the ports of Lakes Superior and Michigan for business at junction points and near competing stations on the respective competing lines. The defendant has to meet these rates by accepting them, or, in case of refusing to meet them must sustain a large loss in losing the business they would afford, and to a share of which under any just system of rates it is fairly entitled. The volume of business here is relatively much larger than at stations from St. Peter to Pierre. All the conditions of transportation are much more favorable. The cost of transportation is far less. The snow blockades are less frequent, and do not last so long. The coal used for operating trains by defendant is transported a much shorter distance than is done to stations from St. Peter to Pierre.

In all that section of country along defendant's line from St. Peter to Pierre these conditions are materially reversed. The conditions of transportation are very unfavorable. The cost of transportation is much greater. The volume of business is light. Local rates graded according to distance are largely a result of the situation. The subject of comparing rates in one portion of the country with rates in another, and rates upon one line with rates upon another, operated under substantially different circumstances and conditions, has repeatedly been before us, and we have uniformly held that they do not constitute a fair basis of comparison. (See *Evans and Reed v. The Oregon Railway and Navigation Co.*, 1 Interstate Commerce Commission Reports, page 336; the *Business Men's Association of the State of Minnesota v. The Chicago, St. Paul, Minneapolis and Omaha R. Co.*, recently decided; (s. c. *infra*) the *La Crosse Manufacturers' and Jobbers' Union v. The Chicago, Milwaukee and St. Paul R. Co.*, 1 Interstate Commerce Commission Reports, page 629).

We have also had occasion to consider the subject of the

rate per ton per mile decreasing for the greater distance, as insisted on here, and we have held, as we have found, that while this is one of the incidents or elements, and, indeed, may be said to be a rule in the case of joint rates on long hauls or through rates on long hauls, unless modified by exceptional conditions of transportation, yet that it cannot, as a rule, be considered as a test in railroad operations in the case of local rates. The rates in question are the local rates of the Chicago and Northwestern R. Co. at all its stations from Chicago to St. Peter (Farrar & Co. *v.* The East Tennessee, Virginia and Georgia R. Co., 1 Interstate Commerce Commission Reports, page 487; Business Men's Association of the State of Minnesota *v.* The Chicago, St. Paul, Minneapolis and Omaha R. Co., 2 Interstate Commerce Commission Reports, page, 59, 60; s. c. *infra*).

Rate per ton
per mile de-
creasing for
greater dis-
tance.

Exceptional instances may, indeed, be found in the case of local rates upon one part of the line of a railroad and as between given points, which will show a decreasing rate per ton per mile for the greater distance, while the aggregate rate is higher. Such a case was that of the local rates of the Chicago, St. Paul, Minneapolis and Omaha R. Co. between Washburn and St. Paul, as found in the complaint of the Business Men's Association of the State of Minnesota *v.* The Chicago, St. Paul, Minneapolis and Omaha R. Co., 2 Interstate Commerce Commission Reports, page 61; s. c. *infra*. Such a case is the present as to the rates by the Chicago and Northwestern R. Co. between Chicago, Mankato, and St. Peter. But every such instance is rare and exceptional, and the circumstances and conditions surrounding the transportation and causing these rates are unusual and extraordinary. In every such case as that the fact that the rate per ton per mile decreases for the greater distance, is itself an exceptional incident of an exceptional condition of affairs, and not a rule which can safely be applied to other conditions of transportation substantially different.

As to local rates, substantially different conditions generally exist, and other rules usually prevail. Local rates, are as a rule graded at stations, according to distance, and occasionally stations are grouped where this can be done by giving relatively fair rates to all and without unjust discrimination. The transportation agencies of the country are made to meet each of these substantially different conditions of transportation. Where joint rates prevail on long hauls, or through rates upon long hauls, there are usually fast freight lines; there are car-loads and often train-loads, and there is a large

Local rates—
Different con-
ditions—Other
rules.

volume of business. In the usual local business of a railroad, without regard to what its length may be, it has to properly serve all its stations, however small, and all its patrons, no matter how light or unremunerative their business may be. For this business it has its local way freight trains, in which there is a considerable increase of expense, with their slow speed, with their stopping at every station, with their handling and delivering freight in small quantities, in packages and in parcels. The rule that the rate per ton per mile must decrease relatively for the greater distance, insisted upon in this proceeding, taking the rate from Chicago to St. Peter as the basis and carrying it through as the standard to Pierre, is one that is inapplicable. The reasonableness or the unreasonableness of the rates between St. Peter and Pierre must be determined by considerations that are different.

The considerations that must govern in a test of the rates between St. Peter and Pierre must be such as will fairly apply to the substantial conditions and circumstances attending the service performed.

Considerations governing in test of rates.

They must be such as are applicable to a new railroad, recently built in a new, thinly inhabited, and largely uncultivated country, where the traffic is light and the freight is all local. It is a far interior section of the country. Freight brought to it is upon long expensive local hauls. The conditions of transportation by which it is reached are far more expensive than in localities near to the water competition of the Great Lakes. And under such circumstances the rates, as a rule, must generally be higher in proportion to distance.

The question that has given us most difficulty has been whether the rates at the stations between St. Peter and Pierre were not graded too high—that is, whether they would not be more reasonable if they were graded lower. On this feature of the case the evidence furnishes us so little light that we are unable to proceed to any intelligent determination. There is no evidence before us as to what the volume of traffic is on this portion of the line, except that it is light. How light, the evidence does not show. The inference is irresistible that it must be comparatively light when contrasted with the volume of traffic between Chicago and St. Peter. Then we are told that the country is thinly inhabited and but little cultivated. In the same connection the evidence informs us that two of its chief articles of freight are wheat and agricultural implements, each of which are articles of prime necessity usually hauled in car-load lots and at low rates. The additional cost of service by having to transport coal from

Reasonableness of rates at stations between St. Peter and Pierre.

Chicago used in operating the trains is not shown. The additional cost of maintaining stations to the amount of business done is not shown. The additional cost of service arising from snow blockades is not shown. We are unable, and at the same time we are unwilling, to pass upon the reasonableness of these rates between St. Peter and Pierre upon the meagre evidence before us.

We have instituted an elaborate comparison between the rates prevailing upon this line of the defendant and that of its leading rival and competitor, the Chicago, Milwaukee & St. Paul R. Co., supposing that such comparison might throw some light upon this subject. For the purposes of such comparison we took that line of the Chicago, Milwaukee & St. Paul R. Co. extending from La Crosse, by way of Winnebago City, to Woonsocket, in Dakota Territory, south of and near Huron, and connecting at Woonsocket with another line of the same company which crosses the Chicago & Northwestern railway at Wolsey one hundred and six miles east of Pierre and extending thence northwest to Edgely, in Dakota Territory. This line is constructed and operated much of its way through a country that would seem to be similar in many respects to that on the line of the Chicago & Northwestern railway between St. Peter and Pierre; for a long distance it runs south of, not greatly distant from, and parallel with the defendant's line between St. Peter and Pierre, and upon its line the conditions of transportation might naturally be supposed to be in many respects substantially similar.

Comparison
with rates up-
on Chicago,
Milwaukee &
St. P. R. Co.

We found that this comparison threw no light upon the subject. On this line of the Chicago, Milwaukee & St. Paul railway we found that the Chicago rates to points of the same distance as those on the Northwestern railway between St. Peter and Pierre were relatively considerably lower, while on the other hand its local distance rates between stations were considerably higher than those of the Northwestern railway; and the combination of the two makes a higher rate on the Chicago, Milwaukee & St. Paul railway to these points than is made by a like combination of the rates on the defendant's line. We therefore will be obliged to make this matter the subject of another and separate investigation, such as is provided for by the statute.

Another feature of the rates on defendant's line between St. Peter and Pierre, as developed at the hearing of this proceeding at Omaha, was that there was evidence offered by the petitioner tending to show that by a combination of the rate from Chicago to St. Peter added to the local rates between St. Peter and

Evidence of
lower combi-
nation rates
from Chicago.

several of the stations between St. Peter and Pierre, a lower total rate would be obtained than on the direct rate from Chicago to each of these stations. These stations are, upon first-class freight, Walnut Grove, Tracy, Balaton, Lake Benton, and Highmore; upon fifth-class freight, Sleepy Eye, Sanborn, Walnut Grove, Tracy, Balaton, Lake Benton, Elkton, Huron, Miller, Highmore, and Pierre; and upon Class A, Sanborn, Walnut Grove, Tracy, Balaton, Lake Benton, Iroquois, Wolsey, Miller, and Highmore. On branches of this line there was evidence of the same character as to rates on first-class freight at Marshall and Canby; on fifth-class freight at Marshall, Canby, and Gettysburg, and on freight of Class A, at Marshall, Canby, and Watertown.

This evidence is corroborated by the tariffs of the defendant on file with us, which show this condition of affairs to exist. According to these freight may be shipped from Chicago to St. Peter at one rate, unloaded, and then subsequently re-shipped from St. Peter to each of these stations at a rate which, added to the rate from Chicago to St. Peter, is considerably less than the direct rate from Chicago to each of these stations. No reason that we are aware of exists, that could justify this anomalous condition of affairs. Still some such reason may exist under the peculiar conditions of transportation at St. Peter, and before condemning it and ordering its discontinuance we will give the defendant an opportunity to be heard respecting it in an investigation which we will inaugurate. The same condition of affairs may exist as to other classes of freight, and this investigation, as made by us, will embrace all classes of freight. The reason for our taking this course is that the evidence upon this subject was admitted only for the purpose of the bearing it might have, if any upon the unreasonableness of rates at stations from St. Peter to Pierre, and the matters to which it directly related were not made the subject of complaint, so that the defendant could have an opportunity to answer them, but were brought forward collaterally in the evidence at the hearing for the first time.

By section 15 of the act to regulate commerce it is provided that if in any case in which an investigation shall be made by the Commission, it shall be made to appear to the satisfaction of the Commission, either by testimony of witnesses or other evidence, that anything has been done, or omitted to be done, in violation of the provisions of the statute by any common carrier, it shall be the duty of the Commission to take the proper proceedings to put an end to such violation of law. In the case of *Smith v. The Northern Pacific R. Co.*

Matter as to
which defend-
ant will have
another hearing.

(1 Interstate Commerce Commission Reports, page 209), where the company in its answer admitted what was a violation of law, although the petitioner failed upon the proof to establish his complaint, yet, as the company in its answer had deliberately confessed as to another matter a violation of the statute, this established such violation clearly to our satisfaction, and we ordered the company to cease and desist from such further violation. The present case differs from that, in this, that here the company has not admitted the violation of the statute. It may be acting upon some conditions of transportation as it exists at St. Peter, which may or may not justify its action as to the differences made on direct rates from Chicago to points west of St. Peter, and the combination of the Chicago rate to St. Peter with the local rates to stations added between St. Peter and Pierre. For these reasons we will give the company a hearing on this, and the reasonableness of its rates between St. Peter and Pierre and its branch roads west of St. Peter, in a separate investigation of these matters.

All that we can decide in this proceeding now is that the rule insisted upon by the petitioner, that the rate per ton per mile, taken as a basis between Chicago and St. Peter, must be adopted as the standard at stations between St. Peter and Pierre, and that the latter rates must decrease relatively for the greater distance in the same proportion as from Chicago to St. Peter, is one that in the existing conditions of transportation along the line of this railroad, upon the evidence in this proceeding, cannot be sustained. As the complaint is based upon this ground alone, and was so tried by the parties and heard by the Commission, it results from the views we have expressed that this petition must be dismissed.

Rule insisted
on by peti-
tioner not
sustained.

BUSINESS MEN'S ASSOCIATION OF THE STATE OF MINNESOTA

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO.

(*Interstate Commerce Commission, June 20, 1888.*)

Interstate Commerce—Competing Lines—Local Rates.—The distance from Duluth to St. Paul by the St. Paul and Duluth railroad is 152 miles; the distance between the same points by the line of the Chicago, St. Paul, Minneapolis & Omaha R. Co. is 178 miles, and from Washburn to St. Paul by the line of the same company, 188 miles. In transporting freight, the latter company made a freight rate, from the Lake Superior points above mentioned to St. Paul, which was the same as that adopted by the St. Paul & Duluth R. Co., and under which the rate per ton per mile decreased in proportion to the greater distance, while the aggregate of the rate increased. For points between St. Paul and Sioux City the freight rate on traffic coming from Lake Superior was in some instances graded according to distance, and in some instances grouped so as to make the same rate at contiguous stations. The rate charged on traffic from Lake Superior after it reached St. Paul showed an increase per ton per mile, and was not in keeping with the rule above stated. It appeared that the rates from Sioux City, and points between Sioux City and Mankato, were controlled by rates made to Chicago and other Lake Michigan points. *Held*, that under the circumstances of the particular case, the rule that while the aggregate charge is continually increasing the further freight is carried, the rate per ton should be constantly decreasing, did not apply owing to the competition which caused the adoption of the same rates between St. Paul and Lake Superior, as those adopted by the St. Paul & Duluth Railroad.

PETITION by the Business Men's Association of the State of Minnesota against the Chicago, St. Paul, Minneapolis & Omaha R. Co., complaining that the freight rates upon merchandise transported between Washburn, Ashland, Superior, Bayfield, and Duluth, Lake Superior points, and Mankota, and other points upon the defendant's line south and west of St. Paul, were unjust and unreasonable, so far as concerned the rates from St. Paul southward and westward. The opinion states the circumstances out of which the application arose.

J. M. Burlingame for petitioner.

J. D. Howe for defendant.

BRAGG, C.—The complaint in this proceeding avers that

petitioner is an association consisting of the several boards of trade, business men's associations, and farmers' organizations of the State of Minnesota, and that the object of the organization is to secure equal and reasonable rates for the transportation of persons and property in accordance with State and national legislation. Averments in complaint.

It avers that the Chicago, St. Paul, Minneapolis & Omaha R. Co. is an organization duly incorporated under the laws of the State of Wisconsin, and owning and operating lines of railway, and doing business as a common carrier in the transportation for hire of passengers and property in the States of Wisconsin, Minnesota, Iowa, and Nebraska.

It avers that the defendant railway company, for its services as such common carrier in carrying merchandise of all kinds and classes from Superior, Ashland, Washburn, Bayfield, and Duluth, Lake Superior ports, to stations on its line of road above indicated, has established and published a tariff of freights and charges, as it of right ought to do, which establishes and makes a reduced rate per ton per mile for the greater distance from said lake ports for all stations on its line of road between them and St. Paul, Minnesota, an average distance of 185 miles, while in the same tariffs for a continuous transportation of the same freights, over the same line and from the same points of origination, it establishes and makes a higher through rate per ton per mile for the stations west and south of St. Paul. In support of this charge the petitioner makes part of its petition a table of extracts from said tariff, wherein the rate per ton per mile is figured from the rates and distances as above stated, showing, as it is claimed, the results averred by the petitioner.

That on the first four classes of freight all stations in the State of Minnesota south of Henderson and on said line of the said defendant railway are charged an unreasonable rate and rate per ton per mile.

That on the fifth class (the most important class of general merchandise) all stations in the State of Minnesota south of St. Paul on the said line of road are charged an unreasonable rate and rate per ton per mile.

That on classes A and B all stations south of Henderson on said line are charged an unreasonable rate and rate per ton per mile.

That on class E all stations south of Mankato on said line are charged an unreasonable rate and rate per ton per mile.

That on classes C and D all stations on said line south of St. Paul are charged an unreasonable rate and rate per ton per mile.

That on the classes of coal and grain (staples of vital im-

portance) all stations on said line of road are charged an unreasonable rate and rate per ton per mile.

That such charges are unjust and unreasonable and in violation of section 1 of an act to regulate commerce, approved February 4, 1887.

That by such charges such common carrier gives an undue and unreasonable preference and advantage to several certain stations and localities along the line of the said route, and to the same extent subjects the certain other stations and localities to undue and unreasonable prejudice and disadvantage, in violation of section 3 of said act.

The prayer of the petition is that the charges made in it may be investigated, and if established, that an order shall be made to said common carrier to amend its tariffs of rates and charges so that it shall not now nor at any time in the future charge as high a rate per ton per mile for the longer as for the shorter haul aforesaid, and that such proportionate rates may be recommended as shall be just and reasonable, and as shall prevent all undue preferences and advantages and all undue and unwarranted prejudices and disadvantages.

The defendant railway company, answering this complaint, admits that it is a corporation chartered under the laws of **Defendant's** the State of Wisconsin, and owns and operates **answer.** lines of railway and is doing business as a common carrier over such lines in the transportation for hire of passengers and property in the States named in the complaint.

It neither admits nor denies the averment in the complaint that petitioner is an association consisting of the several boards of trade, business men's associations, and farmers' organizations of the State of Minnesota, or the objects of said association.

It admits that as such common carrier it has established and published the tariff of freights and charges from Superior and other Lake Superior ports to stations on its line in the State of Minnesota and to other stations mentioned in the complaint.

It avers that even if it be true, as charged in the complaint, that defendant "establishes and makes a reduced rate per ton per mile for the greater distance from said lake ports for all stations on its lines of road between them and St. Paul, Minnesota, an average distance of 185 miles, while in the same tariffs for a continuous transportation of the same freights, over the same line and from the same point of origination, it establishes and makes a higher through rate per ton per mile for stations south and west of St. Paul," yet, if such statements are true, the defendant has not thereby violated any law of the United States.

The answer further denies all the other averments of the complaint.

On the hearing, the evidence adduced in this proceeding by the petitioner consisted of the tariffs in force upon the railroad and those proposed to be put in force March 26th, 1888, of which notice had been given to that effect, and also oral testimony in relation to these tariffs and tables showing the relative rates per ton per mile on freight between stations along its line. It was admitted at the hearing by the petitioners that as to the first four classes of freight there was no serious ground of complaint, and that these would not have been embraced in the complaint but for the other matters complained of.

The evidence in support of the complaint was mainly directed at class 5, class A, and the commodity tariffs on coal and grain.

The chief articles in the 5th class, car-loads, are: apples, beans or peas, dried beef, canned meats and fish, cider in wood; coffee—green; crockery and earthenware; fish—dried; glucose; hides—green; hollow ware—iron; axle—wagon; iron—bar, band, boiler, rod; car wheels and axles; castings—iron, machinery, chain in casks, nails and spikes, nuts, bolts, rivets, washers, hinges; kraut, meats, and vegetables—dried or desiccated; molasses in barrels, kits, or kegs; oil—coal, carbon, crude petroleum, petroleum, lubricating, naphtha, gasoline, in tank cars; oil—coal, in wood or iron barrels; oil—cotton-seed, in barrels; oil—linseed, in barrels; oysters—cove or pickled; rice, rice flour, rice meal, and broken rice; rubber, roofing material; shot in bags, kegs, or boxes; soap—common; soap powder and washing and scouring compounds; stoves, furnaces; furnace castings, grate bars and castings, rocking grates and iron thimble collars; also stove plate and stove furniture; sugar—except maple or lemon, syrup N. O. 5, in barrels or kegs; tallow; tile roofing; vinegar in wood; wire cable; wire—fence, barbed and telegraph.

The chief articles in Class A, carloads, are: agricultural implements; broom-corn, in bales; fire-engines; bedsteads, chair-stuff, and tables; handles—wood; machinery; mantels—iron, marble, or slate; mills—cider; mills—bark, cane, cob, grain, hominy, or paint; mills—saw; mill-stones; potatoes—sweet; poultry—alive; presses—broom-corn, cheese, cider, copying, hay; pumps—chain; pumps—iron; pumps—steam; safes—cheese; scrapers—road; seed—Alfalfa, Lucerne, clover, timothy, cane, broom-corn, Hungarian, and rape; sheep dip; stump-pullers; trucks—logging; vehicles; carts—mining, dump, or hand;

wagon wheels, wheelbarrows, wire binding for harvesters' boxes.

On this evidence petitioner contended that these rates were unjust and unreasonable in the particulars averred in the petition. The evidence was also directed to the coal and grain rates made in these tariffs.

On the part of the defendant railway company the evidence at the hearing consisted of its tariffs in force and to be put in force March 26th, 1888, of which notice had been given as required by the statute, with notations upon each of these of the rate per ton per mile on freight transported over its line to its different stations; oral testimony as to how and upon what reasons all its different rates were made; tables of comparison, tending to show that those rates were as low as, and in most instances lower than, those on neighboring and competing lines upon the same articles of freight; and that the increase of the rate per ton per mile on most of its articles of freight south and west of St. Paul was justified by its condition and circumstances, had long been in force, had never been complained of by any shipper before, and was not in conflict with the rule of making rates by other railroad lines of the country similarly situated; and that its increase of rate per ton per mile was caused by its grading its rates between stations according to distance. Upon this evidence it insisted that all of its rates were just and reasonable.

Evidence on part of defendant.

Without enumerating at length all the details of the evidence thus submitted, all of which we have carefully examined and considered, we deem it necessary to state only our findings upon the facts shown by this evidence, which are material to the merits of the controversy, and to the conclusions we have reached. These findings of fact we now state:

Findings of fact.

The petitioner is an association consisting of the several boards of trade, business men's associations, and farmers' organizations in the State of Minnesota, and the object of the association is to secure equal and reasonable rates of transportation of persons and property in accordance with state and national legislation. The Chicago, St. Paul, Minneapolis and Omaha R. Co. is a corporation incorporated under and by virtue of the laws of the State of Wisconsin. It owns and operates a large system of lines of railway, and does business as a common carrier in the transportation of persons and property in the States of Illinois, Wisconsin, Minnesota, Iowa, and Nebraska. Its rates assailed in this proceeding are upon shipments over the line from Washburn, Bayfield, and Ashland, each a Lake Superior port, to

points south and west of St. Paul. The complaint relates to its rates at the following stations: Henderson, Le Sueur, St. Peter, Mankato, Medalia, St. James, Windom, Worthington, Loverne, Pipestone, Sioux Falls, and Sioux City. Its shipments south and west from Lake Superior ports are chiefly from Washburn. Its rates as between Washburn and St. Paul, a distance of 188 miles, are conceded to be reasonable and just. These last-named rates are rates made by the St. Paul and Duluth railroad, a much shorter line from St. Paul to Duluth—a large and important Lake Superior port—which line is wholly within the State of Minnesota, 152 miles in length, not within the superintending control of the act to regulated commerce, approved February 4, 1887, and are thus forced upon the Chicago, St. Paul, Minneapolis and Omaha R. Co., which must make the same rates between Washburn, Bayfield, and Ashland. on the one hand, and St. Paul on the other, or else go out of the business, or sustain very great financial loss. By a branch of its line extending from Superior Junction to Superior, a port on Lake Superior, and reaching to Duluth, the defendant also has a line extending from St. Paul to Duluth, and by this line the distance from St. Paul to Duluth is 178 miles. The rate per ton per mile on these roads from all these Lake Superior ports by defendant's lines to St. Paul is one that continually grows less as the distance increases, while the aggregate charge grows greater with the distance the freight is transported, as between these Lake Superior ports and St. Paul. It is one of the necessities of the present situation that rates from and to these Lake Superior ports from St. Paul must be substantially the same. The rates from Washburn to St. Paul are not remarkably low rates.

From St. Paul to stations on its line south and west, such as Henderson, Le Sueur, St. Peter, Mankato, Medalia, St. James, Windom, Worthington, Loverne, Pipestone, Sioux Falls, and Sioux City, as to the first four classes of freight the rates are graded, usually, according to distance, in some instances grouped so as to make the same rate at contiguous stations. These rates are conceded to be substantially reasonable by the petitioner, and we do not find from the evidence that they are unreasonable or unjust. We mention these stations because they are those that are named in the complaint.

From and to these stations rates are graded in much the same manner on articles in the 5th class, in the A class, and upon coal and grain as in the first four classes named, except that at some of the stations the rate per ton per mile increases somewhat more in proportion to distance than does

the rate per ton per mile upon articles embraced in other classes of freight, while in other instances they do not, and there is also the same occasional grouping of stations. The increase of the rate per ton per mile at the stations south and west of St. Paul results from the grading of the rates at these stations according to distance.

The defendant's line from Duluth and Washburn through St. Paul to the stations in the State of Minnesota and Territory of Dakota and into Western Nebraska is crossed fifteen times, at about an average distance of twenty-seven miles apart, by lines of railroad which lead directly to ports on Lake Michigan. There is a sharp competition for business on defendant's line south and west of St. Paul, between business seeking the Atlantic coast by way of Lake Michigan, during the season for navigation, and the trunklines at all times, and such business seeking the same destination over defendant's lines by way of Lake Superior, during the navigable season, and the lines of railway connecting with the Canadian systems at all times. A fixed relation of rates to meet this condition of affairs exists, and these rates appear to have been established after numerous rate-wars between the great competitive lines. To illustrate: The rate from Sioux City to Duluth, which is the same as to Washburn, is the same as the rate from Sioux City to Chicago, and the rate from Mankato to Duluth or Washburn is the same as the rate from Mankato to Chicago. This is because Chicago is the eastern terminus of the Chicago and Northwestern railway, as Washburn is the northeastern terminus of the Chicago, St. Paul, Minneapolis and Omaha railway for Lake Superior business, and Mankato is the crossing point of these great rival lines, where freight could be made to go either to Chicago or Washburn, according to difference in rates. The rates made on defendant's line at these points are so arranged as to meet this competition, and at the same time are so graded and grouped as to avoid a violation of the 4th section of the act to regulate commerce, approved February 4, 1887.

A large portion of the traffic of the defendant's road, commencing at Washburn and destined for points south and west of St. Paul, is through freight. A large portion of its east-bound traffic is wheat that is dropped at Minneapolis and is therefore local freight. There is no evidence as to the amount of defendant's shipments south and west from Superior and Duluth.

For a considerable distance south and west of St. Paul the defendant's railway line runs somewhat parallel to the Chicago, Milwaukee & St. Paul railway and the Minneapolis & St. Louis railway. Stations upon these several lines are

frequently competitive, but in no instance is the distance exactly the same from the points of origin of the freight. To require a constant decrease in the rate per ton per mile as the distance increases over which freight is transported would have much the same effect upon the business of these railroads at these stations as would an equal mileage distance tariff. An equal mileage distance tariff for each of these stations on each of these railways would destroy competition, and so would the establishment of an equal rate per ton per mile. The establishment of rates to such stations based upon an equal rate per ton per mile would also result in a system of infinitesimal fractions in the rates at these stations, nowhere known in the railroad business, and which would result in constant confusion in the carriers' business as well as the business of shippers, accomplishing no substantial and practical benefits to the communities surrounding these stations.

A result of the competition of the water lines, afforded by Lakes Superior and Michigan on the one hand, which are not subject to the provisions of the act to regulate commerce, and in connection with these the operation of the 4th section of the act to regulate commerce upon the railroads has been a phenomenally low standard of rates diffused over a very large section of country situated between the rival ports on these lakes and the lines of railway extending from them to St. Paul and Minneapolis. Before the enactment of the act to regulate commerce this existed as to only a very few stations, but since then, from the causes named, it has prevailed over a large extent of country, and numerous stations on these railroads, widely distant from each other, have the same groups of rates. The same results have not reached into the interior south and west of Mankato to anything like the same extent. The interior points on the lines south and west of Mankato are indeed greatly benefited by this condition of affairs in their through rates to and from distant markets, though not to the same extent as points situated along the railway lines between these rival lake ports. In the one instance, grouping of stations so as to give them the same rates is a present peculiarity of the situation; and in the other, owing to greater distance from these water-ways, interior locality, a much lighter volume of freight, large increase of cost of transportation and expense of maintaining operation in proportion to the less volume of business, and the much greater absence of competition, it results that the grading of the rates at stations according to distance becomes also, to a considerable extent, a necessity of the situation, though in some instances these are grouped.

These findings of fact are such as we make upon the complaint, as made, and the evidence in reference to it; and, as required by the statute, we now proceed to state our conclusions.

The questions involved in this proceeding are of an important character to the public in a large section of the country as well as to the carriers. Features of some of these questions as then presented we have had occasion to consider and discuss in other proceedings, but others of them have not heretofore been presented in any controversy for our determination.

Substantially there are two specific charges in the complaint. One is that the rates are unreasonable and unjust; the other is that the rate per ton per mile is unreasonable and unjust. These two charges are made against the rates to all of a certain class of stations named under six different heads in the complaint. The stations thus specifically named in the complaint are Henderson, Le Sueur, St. Peter, Mankato, Medalia, St. James, Windom, Worthington, Lloverne, Pipestone, Sioux Falls, and Sioux City. But intermediate stations not specially mentioned are also included in the general terms of the complaint.

The complaint, after averring that the rates charged by the defendant between Washburn, Bayfield, Superior, Ashland, and Duluth, Lake Superior ports, to St. Paul are reasonable rates, and that in making them the rule is observed of making a reduced rate per ton per mile from these lake ports to all stations on the line of railroad for the greater distance to St. Paul, which, it is alleged, is the correct rule on the subject, proceeds to charge that as to stations south and west of St. Paul this rule is violated, and not only much higher rates are charged on freight in consequence of this violation, but also in the manner in which the rates are graded at many of these stations.

At the outset we find it necessary to examine and consider the primary proposition involved in petitioner's complaint, which is that as to rates between the above-named Lake Superior ports and St. Paul, which are conceded to be reasonable, fair, and just, and as following the rule that the rate per ton per mile must be less for the greater distance, and that these should furnish the rule for making all other rates on defendant's line south and west of St. Paul. But little of the freight brought by defendant south from these lake ports comes from Ashland, Superior, and Bayfield. Nearly all of it originates at Washburn. There was no evidence as to the

amount of freight it brings from or carries to Duluth. The distance between this point and St. Paul by defendant's line is 178 miles. The distance from Washburn to St. Paul by defendant's line is 188 miles. The distance from St. Paul to Duluth—another large and important Lake Superior port, not far distant from Washburn, and rival and competitive with it—by way of the St. Paul & Duluth railroad is 152 miles. The St. Paul & Duluth railroad is a State road, and having both its termini in the State of Minnesota, and, so far as its business is concerned, which is not interstate, is not governed by the provisions of the act to regulate commerce. The rates made by the St. Paul & Duluth railroad between Duluth and St. Paul are considerably lower than any rates which the defendant has on its line of railway anywhere, except between Washburn and St. Paul, and Superior and Duluth and St. Paul, and are adopted by the defendant as to freight between Washburn and St. Paul, because it is obliged to carry this freight at the same rate that the St. Paul & Duluth railroad carries freight from Duluth to St. Paul or else virtually go out of the business, or if remaining in it, to lose a great part of this business and thereby sustain large financial loss. At the same time these rates between Washburn and St. Paul are not exceptionally low rates. If it were true that the defendant, without being coerced into making these rates between Washburn and St. Paul by a state railroad not subject to the provisions of the act to regulate commerce, had made these rates of its own choice, then there might be much force in the ground assumed by the petitioners. As it is, however, the fact that the defendant railway company adopts these rates, not as a matter of choice, but because it is compelled to do so in consequence of the rates made by the St. Paul & Duluth railroad from Duluth to St. Paul, or else sustain large and irreparable loss from failing to do so, is a factor in the situation that cannot be disregarded. Upon business principles it is clear that the defendant railway company would proceed on a management that would be greatly prejudicial to those who have invested their money in its corporate enterprise, if it did not adopt the same rates from Washburn to St. Paul that the St. Paul & Duluth railroad has made from Duluth to St. Paul, provided it can do so consistently with law. As stations on its line south and west of St. Paul this carrier does, indeed, in many instances, have to meet competition, but it is the competition of carriers which, like itself, are subject to the provisions of the act to regulate commerce, and as against them it has the protection afforded by the statute. Nowhere else, except between

Washburn and St. Paul, does it encounter the competition of a line of railroad having its termini exclusively within the limits of one State and operating a shorter line of road, which makes rates that it is compelled to adopt.

The question then arises, Do these conditions and circumstances justify the defendant in adopting the rates it does between Washburn and St. Paul? The words "substantially similar circumstances and conditions," as found in the second and fourth sections of the act to regulate commerce, as we understand and construe them, in certain important particulars define the duties and rights of carriers, and the rights of shippers as well. If the carrier claims to act under a compulsion of circumstances and conditions of his own creation or connivance in the making of an exceptional rate, then these will not avail him. If the carrier claims to act under a compulsion of circumstances and conditions, which he could obviate by reasonably fair and just exertion on his part in the making of an exceptional rate, then they will not avail him. But if the carrier is in good faith acting under the compulsion of circumstances and conditions beyond his control, not of his connivance, and which he could not obviate by any reasonably fair and just effort on his part, and to avoid overwhelming loss adopts exceptional rates forced on him by the action of an independent state road which is not subject to the act to regulate commerce, and which is operating a shorter and competing line with his own, these are, in our opinion, under the operation of the statute, circumstances and conditions which justify him in doing so.

Can it then be said to be a fair basis of comparison to take these rates between Washburn and St. Paul as the standard for what should be reasonable rates at stations on defendant's line south and west of St. Paul? We think not. The rates of defendant between Washburn and St. Paul are not made by the defendant upon the ground that they are reasonable, but are adopted from the necessity of the situation, and as forced upon it by the St. Paul & Duluth R. Co. It results from what we have stated that the rates of the defendant at its stations south and west of St. Paul on shipments from Washburn, Bayfield, and Ashland, as to their reasonableness and justness, must be determined by other considerations than the mere fact that, as between these Lake Superior ports and St. Paul, the defendant is compelled to adopt comparatively lower rates made by the St. Paul & Duluth R. Co.

The stations south and west of St. Paul on the defendant's

line, as we have found, are occasionally graded, and in other instances grouped, so as to avoid violating the fourth section of the act to regulate commerce by making a greater aggregate charge for the transportation of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. The manner in which these stations are grouped, where they are grouped, does not appear to work injuriously by giving to the shippers of one community relatively better rates than another in the shape of unjust discrimination. The stations, on the other hand, that are graded, appear to be so graded according to distance as to make the aggregate charge relatively higher, though not so in such proportion as to injuriously prejudice the shippers in any locality, so far as we can see from the evidence adduced in this proceeding. The method of grouping stations and grading stations for a continuous haul of freight by a railway carrier is one that is very common in this country and is not necessarily illegal, unless the results that flow from it are illegal. *La Crosse M. & J. Union v. Chicago, Milwaukee & St. Paul R. Co.*, 1 Interstate Commerce Commission Reports, page 631. The rates thus made at stations south and west of St. Paul are in nearly every instance relatively higher than the rates between stations of the same distance on the line of defendant's railroad between Washburn and St. Paul; but, at the same time, when these rates are compared with those of other lines, they appear to be as low as, and in most instances lower than those of other neighboring and competing lines of railroad. According to the largely preponderant weight of evidence in this proceeding they are reasonable rates.

Stations west
and south—
Grouping and
grading sta-
tions.

The conclusion we have reached as to the manner in which the rates of the defendant are made between Lake Superior ports and St. Paul show that they cannot be adopted as a just and fair basis for the operation of the rule insisted upon by the petitioner as to the rate per ton per mile to points south and west of St. Paul. It is very true that, unless exceptional conditions exist modifying such a rule, in the case of joint rates, the rate per ton per mile usually grows less in proportion to the greater distance, and that examples of this may be seen in tariffs of railroads generally in the United States upon long hauls of freight. This result does not usually occur in the local tariffs of railroads where the stations are graded occasionally and in other instances grouped. The rates of the defendant are not joint rates. They are its own local rates made for stations along its line between and to and from Wash-

Rates between
Lake Superior
ports and St.
Paul not a fair
basis.

burn and Sioux City, Washburn and Pipestone, and Washburn and Sioux Falls, and all intermediate stations on its road over a main line of railroad 455 miles in length.

We referred to this subject in the case of Farrar & Co. against the East Tennessee, Virginia & Georgia R. Co. and the Norfolk & Western R. Co., 1 Interstate Commerce Commission Reports, page 487. That was a case of joint rates on lumber. We there said:

Farrar v. East Tenn., etc., R. Co. examined.

"It is a familiar rule in the transportation of freight by railroads, and has become axiomatic, that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time, unless there be exceptional conditions modifying this rule. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles, arising out of the character and nature of the services performed and the cost of the service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of our country." We were then considering and discussing joint rates, but even as to these we recognized that there might be "exceptional conditions" modifying the rule.

These exceptional conditions are found to exist in this very case. These are seen most notably in the case of the rates between Washburn and St. Paul, which we have already discussed. Other exceptional conditions are seen in the differences which exist between a large section of the country situated between rival ports on two great lakes, at a large number of stations necessarily grouped upon rival and competing lines of railroad near to and operating between these ports, and under the operation of the long and short haul clause of the act to regulate commerce, and on the other hand, a large interior section of the country adjoining this, where the circumstances and conditions are substantially different, and as to which the shipper must look largely to the benefits arising from competition of railroads alone and the reasonableness of rates required by that statute, and is not aided in these by large waterways, which afford much cheaper transportation and rates that are not subject to the act to regulate commerce. In the one case the carrier groups stations covering a considerable section of country, because he is forced to do so from a variety of controlling circumstances, such as water competition and the operation of the long and short haul clause of the act to regulate commerce, and others that might be named. In the other case to meet the competition of lines that, like its own,

Exceptional conditions found in the case.

are subject to the act to regulate commerce, the carrier, in making its tariffs occasionally groups stations, and in other instances grades stations, so as to keep up to something like a systematic and fair uniformity the aggregate rate to the different stations along its line. In the case of *Evans and Reed against the Oregon R. & Navigation Co.*, 1 Interstate Commerce Commission Reports, page 336, we had occasion to consider the subject of comparing the rates established on railroads in one portion of the country with those in another, operated under substantially different circumstances and conditions, and we there held that such comparisons are not fair tests. That is equally true of the present case of comparisons between rates made in that portion of the country so near as to be dominated by the water rates on Lake Superior, and on the other hand, rates in the far interior made under substantially different circumstances and conditions. And again, in the case of the *Manufacturers' and Jobbers' Union of La Crosse v. The Chicago, Milwaukee & St. Paul R. Co.*, we said: "Many circumstances fairly entitle, and sometimes compel the carrier to make rates on one line proportionately less than are made on another." Some of these circumstances are there enumerated 1 Interstate Commerce Commission Report, page 632.

The rule that the rate per ton per mile must be less for the greater distance is one of the tests by which the rates can be carefully scanned in themselves. It is, however, like looking at them with a microscope. It ignores all other tests except that which it alone furnishes. It ignores all surrounding circumstances and conditions and every factor of every kind and description that enters into the making of the rate, no matter how compulsory or imperious that factor may be. It serves in itself a valuable purpose, not only as a close test of what a rate really is, but also as a basis in the cases to which it can be made to justly apply as a rule; but to determine the reasonableness and justness of a rate, all surrounding circumstances and conditions, and the factors which enter into the making of the rate, if there are any that are compulsory or imperious, must be considered as well as the rights of the shipper. That is apparent in the present case. This rule, as invoked in this proceeding, ignores the circumstances and conditions which surround the making of the rate by the defendant from Washburn to St. Paul. It also ignores the circumstances and conditions which surround the defendant railway for a long distance south and west of St. Paul, where the stations along the defendant's line are so near the stations upon the Chicago, Milwaukee & St. Paul R. and those upon the line of the Minneapolis & St. Louis R. as to be competing

Rule that rate per ton per mile must be less for greater distance considered.

lines and stations with each other. To establish it as a rule for these stations would have very much the effect of the establishment of mileage rates for the same stations. It would destroy all competition between them, because none of them are exactly the same distance from the point of origin of freight, or else, on the other hand, it would load the business both to the carrier and to the shipper with a multitude of infinitesimal fractions nowhere known in the business of railroads.

We had occasion in the case of Evans and Reed, *supra*, to consider and state some of the considerations which enter into the reasonableness of freight rates, and in connection with the enumeration we there said:

Considerations entering into reasonableness of rates. "A variety of considerations of a very practical nature must always enter into the making of freight rates by a railroad company, and these also go very far in every instance to determine the question of whether such rates are reasonable or unreasonable. It would be very dangerous to the successful existence of such companies if they had to make or were required to make freight rates upon mere theories or conjectures. They have to deal with business as they find it." The same idea is expressed in different language in the first annual report of the Interstate Commerce Commission to the Secretary of the Interior, where it is said: "It is quite impossible to deal with this subject on mathematical principles."

The conclusions we have already expressed are decisive of this proceeding; but there is another feature of it which we think deserves to be noticed in connection with them, arising upon the evidence and our findings upon the facts. There is a fixed relation of freight rates existing from and to points south and west of Mankato on the line of the Chicago, St. Paul, Minneapolis & Omaha R. Co. on business going to, or coming from the east, by the competition which exists between this railway and the lines reaching Chicago and other Lake Michigan ports from this section of the country. This is clearly indicated in the evidence. It appears to be the difference of rates between Buffalo and the Lake Michigan and Lake Superior ports, respectively, and this difference, it seems, is usually two and one-half cents per hundred pounds lower on freights from Lake Superior ports, this being the longer route, than from Lake Michigan ports, though the difference has been as great as five cents per hundred pounds. There is between these lines a strong competition for the business of this portion of the country. The rates established have been the result of this competition. This competition

**Competition—
Change in
rates which
would destroy.**

has served a valuable purpose in the cheapening of rates in the section of the country south and west of Mankato, and thus has done the public a great benefit. It is beneficial and important to the public as well as to the railroads that this competition should not be broken down. A change, large, far-reaching, and sweeping, in this system of rates, such as is sought to be accomplished by the complaint in this proceeding, would involve great and corresponding changes in the system of rates upon rival competitive lines reaching Lake Michigan ports from this section of the country, and would not only completely unsettle carrying trade, but would greatly disturb and unsettle business, in many instances causing financial wrecks of business men, as well as entailing great losses upon this carrier which might have the effect of forcing it into bankruptcy. Consequences like these could be justified only upon the ground that in the administration of the statute they were the necessary and unavoidable results of correcting serious abuses, and such abuses we do not find to exist from the evidence in this proceeding.

The order of the Commission is that the petition be, and the same is, hereby dismissed.

INDEX.

NOTE —The mode of citing the American and English Railroad Cases is as follows:

84 Am. & Eng. R. R. Cas.

The index contains references to the decisions and to the notes. References to the decisions are to the pages upon which the cases begin. References to the notes are to the pages upon which the propositions stated in the index are found. References to Constitutional or Statutory Provisions are to the pages upon which they are cited.

ACTION.

Continuing nuisance. Where the erection of a bridge causing overflows is a continuing nuisance in consequence of which a recovery is limited to damages accrued, a judgment in one action is not a bar to a second action. *Omaha, etc., R. Co. v. Standen* (Neb.). 179.

Res adjudicata. In an action for the overflow of a stream caused by the improper construction of a bridge, a judgment in the former suit is no bar to a recovery for injuries subsequently sustained. *Chicago, etc., R. Co. v. Schaffer* (Ill.). 174.

Special policeman. Where a company agrees to pay two thirds of the salary of a special policeman, and for some time after his appointment by the municipality pays its proportion of his salary directly to him, such officer may maintain an action against the company for arrears of salary. *Porter v. Richmond & D. R. Co.* (N. Car.). 137.

ADMINISTRATORS AND EXECUTORS. See DEATH.

Letters of administration. In an action by the personal representatives of a deceased minor, where the jury pass upon the facts in issue, the evidence of the father tending to show that his child died without leaving any estate is not conclusive as against the original findings of the jury, and it cannot be said that the letters were granted without jurisdiction. *Union Pac. R. Co. v. Dunden* (Kan.). 88.

AGENT. See FOREIGN CORPORATION; MASTER AND SERVANT; OFFICERS.

Authority. Where a person acts as a company's agent under such circumstances as to imply knowledge on the company's part, his authority to act is established *prima facie*, and his declarations are admissible in evidence. *Indiana, etc., R. Co. v. Adamson* (Ind.). 127.

Limited ticket. Stamping. Waiver. Where passenger holding limited ticket had it stamped at point other than that named in ticket, evidence held admissible to show that agent at that point was authorized to waive condition that ticket should be stamped at point named therein. *Taylor v. Seaboard & R. R. Co.* (N. Car.). 344.

ANNOTATIONS.***Baggage.***

- Jewellery as baggage. Notice. 254.
- Limiting liability for baggage. 223.
- Merchandise as baggage. 249.
- Merchandise carried for presents or accommodation. 252.
- Merchandise for family use. 252.
- Merchandise packed in baggage. 251.
- Merchandise taken into car by passenger. 254.
- Money as baggage. 253.
- Money. Passenger may place money in trunk without communicating the fact to carrier. 217.
- Penalty for refusal to carry. 255.
- Refusal to carry. 254.
- Sample trunk as baggage. 254.
- Sleeping-car company: liability of, for loss of passenger's baggage. 219.
- Watches as baggage. 253.
- What is baggage. 249.

Children.

- Assessment of damages in causing death of minor children. 93.
- Trespassers. Children trespassing on railroad track. 87.
- Turn-table: injury to children playing upon. 93.

Contract.

- Construction contracts; interpretation. 126.
- Estimates of engineers in construction contracts. 127.
- President. Power of the president to bind the corporation. 110.

Contributory Negligence.

- Knowledge of danger will not impute contributory negligence. 9.
- Recovery notwithstanding contributory negligence. 102 n.

Crossing.

- Acquiescence in crossing at place not a highway crossing. 20.
- Deaf person crossing track. 39.
- Muffled ears: crossing track with. 39.

Damages.

- Excessive damages for causing death of minor. 93.
- Excessive damages for personal injuries. 456.
- Exemplary damages: recovery of, for torts of servants. 439.
- Opinion of witness, not expert, as to damages not admissible. 428.

Death.

- Excessive damages for causing death of minor. 93.
- Minors. Assessment of damages in action for death of minor children. 93.

Eminent Domain.

- Property injured but not taken. 186.

Evidence.

- Condition of track: evidence admissible as to, in case of accident. 404.
- Opinion of witness, not expert, as to damages not admissible. 428.
- Res gestæ*: admissibility of declarations made by party injured as part of. 446.

ANNOTATIONS—Continued.***Express Companies.***

Messenger: injury to. Defective machinery and negligence in employing servants. 359.

Foreign Corporations.

Service of process on agents of foreign corporation. 580.

Interstate Commerce.

Freight rates. Distance. Competitive lines. 590.

Limitations, Statute of.

Personal injury: application of statute to action for. 583.

Master and Servant.

Assaults by servants upon passengers. 380.

Exemplary damages: recovery of, for torts of servants. 439.

Persons "engaged or employed on or about roads," etc., who are within meaning of Pennsylvania statute. 439.

Risks assumed by servant. 276.

Negligence.

Active and passive negligence. 21.

Omission of statutory duty as affecting company's liability. 5.

Officer.

President. Power of the president to bind the corporation. 110.

Parent and Child.

Contributory negligence of parent as bar to child's recovery. 80.

Passengers.

Alighting. Duty to stop train reasonable time to allow passenger to alight. 375.

Arm resting on window sill: injuries to passenger riding with. 526.

Arrest of passenger. 311.

Assaults by fellow-passengers and trespasser. 386.

Assaults by servants upon passengers. 380.

Burden of proof cast upon carrier in case of accident. 413.

Collision: presumption of negligence in case of. 399.

Collision with other vehicles: injuries to street-car passengers by. 523.

Condition of track: evidence held admissible as to, in case of accident. 404.

Derailment: presumption of negligence in case of. 404.

Diseased or disabled persons: injury to. 375.

Ejection of passenger for refusal to pay full fare. 268.

Express messenger: injury to. Defective machinery and negligence in employing servants. 359.

Expulsion. Negligence in the expulsion of trespassers from trains. 285.

Expulsion of passenger for refusal to deliver ticket or pay fare. 311.

Expulsion. When ejected passenger is entitled to exemplary damages. 316.

Free pass: injuries to passengers riding on. 354.

Freight train: notice of change requiring procuring of tickets before entering. 264.

Freight train: procuring tickets before entering. 264.

ANNOTATIONS—Continued.**Passengers—Continued.**

- Freight train. Reasonable opportunity to obtain ticket. 264.
- Freight train : right to travel on. 263.
- Freight train. Rule requiring passengers to be provided with tickets : evidence of non-enforcement of. 264.
- Freight train. Sufficiency of effort to procure ticket. 264.
- Injury to passenger taking or leaving a train. 521.
- Jumping from moving train by person in fear. 281.
- Platform : injury to passenger on. Inconsistent findings. 378.
- Riding on dangerous place. Consent and authority of servants. 273.
- Riding on steps and platform of street cars. 544.
- Seat. Company must provide safe place and seats for passengers. 361.
- Sunday : injuries to passengers travelling on. 396.
- Wrong train. Passenger on train that does not stop at station named in his ticket. Expulsion. 307.

Penalty.

- Baggage : penalty for refusal to carry. 255.

Practice.

- Argument of counsel. Improper remarks of counsel as a ground for reversal. 75.

Rules and Regulations.

- Tickets for passenger trains. Regulations. 267.
- Ticket. Rule requiring passengers to procure tickets before entering freight train. Evidence of non-enforcement. 264.

Signal.

- Trespassers : ringing of bell and sounding of whistle for. 50.

Sleeping-car Company.

- Baggage : liability of sleeping-car company for loss. 219.

Speed.

- No rate of speed is negligence *per se*. 80.

Statute.

- Omission of statutory duty as affecting company's liability. 5.

Street Railroads. See PASSENGER.

- Other vehicles on track. Use of street car tracks by other vehicles. 96.

Sunday.

- Passengers : injuries to, travelling on Sunday. 396.

Surface Water.

- Action for damages. Limitation. 157.
- Civil law rule. 150.
- Common law rule. 149.
- Conflicting decisions. 151.
- In New Jersey. 151.
- Modified doctrine. 151.
- Surface waters. 148.
- Texas statutory provisions. 151.
- West Virginia *dicta obiter*. 151.

ANNOTATIONS—Continued.***Tickets.***

- Commutation ticket. Coupons void if detached; reasonable condition. 338.
- Commutation ticket: ejectment for failure to exhibit. 338.
- Commutation ticket. Refusal to allow conductor to detach coupons. 338.
- Conditions in ticket requiring it to be stamped and signed by the purchaser. 344.
- Condition requiring signature. Waiver. 350.
- Ejection of passenger for refusal to pay full fare. 268.
- Freight train: notice of change requiring procuring of tickets before entering. 264.
- Freight train: procuring ticket before entering. 264.
- Limited tickets. 349.
- Limited tickets. Expiration of time limited. 349.
- Lost ticket: expulsion of passenger for failure to produce. 336.
- Passenger trains: tickets for. Regulations. 267.
- Reasonable opportunity to obtain ticket. 264.
- Reasonable opportunity to procure ticket. 267.
- Reasonable time. Conductor must give passenger reasonable time to find ticket. 336.
- Rule requiring passengers to procure tickets before entering freight train; evidence of non-enforcement of. 264.
- Sufficiency of effort to procure ticket. 264.

Trespassers.

- Acquiescence in crossing. 20.
- Active and passive negligence. 21.
- Children trespassing on railroad track. 87.
- Deaf mute, infants, etc. 56.
- Deaf mute: injury to. 38.
- Deaf person walking along track. 38.
- Failure to look and listen. 58.
- Injury to trespassers on track: liability for. 5.
- Licensee: duty of company to. 20.
- Pennsylvania doctrine. 58.
- Ringling of bell and sounding of whistle. 56.
- Rule under Kentucky and Tennessee statutes. 58.
- Speed. No rate of speed is negligence *per se*. 80.
- Trespassers on railway track. 55.
- Use of right of way as foot-path. 20.

***Trespassers on Trains.* See PASSENGERS.**

- Expulsion of trespassers from train. Negligence. 285.

***Water.* See SURFACE WATER.**

- Overflow on land: measure of damages for. 190.

ARREST. See PASSENGER.**ASSAULT. See MASTER AND SERVANT; PASSENGER.****BAGGAGE.**

- Delivery to porter. Where passenger, on arriving at station, left hand-bag with porter, who disappeared with it, *held*, that the bag was in

BAGGAGE—Continued.

- the custody of the company for purpose of present transit, and its loss was due to their negligence. *Great Western R. Co. v. Bunch* (Eng.). 224.
- Evidence of value. Custom-house inspector cannot testify as to value of personal baggage usually carried by emigrants. *Carlson v. Oceanic Steam Nav. Co.* (N. Y.). 215.
- Hand luggage. A railway accepting baggage to be carried with a passenger is not liable for loss occurring during transit to which act of passenger has been contributory. *Great Western R. Co. v. Bunch* (Eng.) 224.
- Jewellery as baggage. Notice. 254 *n.*
- Jewellery. Notice to carrier. Under U. S. statute emigrant carrying small articles of jewellery and silverware as part of baggage is not a shipper of such articles within the meaning of the law. *Carlson v. Oceanic Steam Nav. Co.* (N. Y.). 215.
- Limiting liability for baggage. 223 *n.*
- Limitation of liability. Stipulation in ticket limiting liability to \$100 is not binding on purchaser unless he agrees to it. *Kansas City, etc., R. Co. v. Rudebach* (Kan.). 219.
- Merchandise as baggage. 249 *n.*
- Merchandise carried for presents or accommodation. 252 *n.*
- Merchandise. Fact that other agents have checked merchandise as baggage, with knowledge, will not operate as notice to company of its nature as to trip during which it was lost. *Blumenthal v. Maine Cent. R. Co.* (Me.). 247.
- Merchandise for family use. 252 *n.*
- Merchandise packed in baggage. 251 *n.*
- Merchandise. Railroad is not bound to carry merchandise as baggage, and is not liable as carrier for loss of merchandise received by it without intimation. *Blumenthal v. Maine Cent. R. Co.* (Me.). 247.
- Merchandise taken into car by passenger. 254 *n.*
- Money as baggage. 253 *n.*
- Money. Passenger may place money in trunk without communicating the fact to carrier. 217 *n.*
- Penalty for refusal to carry. 255 *n.*
- Refusal to carry. 254 *n.*
- Sample trunk as baggage. 254 *n.*
- Sleeping car company is responsible if through failure to exercise reasonable care passenger's baggage is stolen even though the train belongs to another company. *Pullman Palace Car Co. v. Pollock* (Tex.). 217.
- Sleeping-car company: liability of, for loss of passenger's baggage. 219 *n.*
- Watches as baggage. 253 *n.*
- What is baggage. 249 *n.*

BRIDGE. See EMINENT DOMAIN; WATER.

- Care required in constructing and maintaining bridges. Company is bound to take into account fact that accidents may occur, and is held to very high degree of care. *Pershing v. Chicago, etc., R. Co.* (Iowa). 405.
- Construction over crossing. Public convenience. Where a plan, in *mandamus* proceedings to compel a railroad company to restore a street crossing, includes a bridge over the tracks of two companies,

BRIDGE—Continued.

it must necessarily have reference to the rights of each, and neither can be compelled to surrender its property or change its road further than is reasonably necessary. *State v. St. Paul, etc., R. Co. (Minn.)*. 168.

Construction over crossing. Where, in *mandamus* proceedings to compel the restoration of a street crossing, the court found that the plan proposed by the relator was suitable, and the return to the supreme court fails to disclose the evidence upon which such finding is based, it will be presumed that the evidence was sufficient. *State v. St. Paul, etc., R. Co. (Minn.)*. 168.

Contributory negligence. Where bridge lies in the only practical route for traveller he is not guilty of negligence contributing to injuries caused by defects in such bridge although he attempted to cross in the knowledge of such defects. *Gulf C. & S. F. R. Co. v. Gascamp (Tex.)*. 6.

Defective construction. Continuing nuisance. Where the erection of a bridge causing overflows is a continuing nuisance in consequence of which a recovery is limited to damages accrued, a judgment in one action is not a bar to a second action. *Omaha, etc., R. Co. v. Standen (Neb.)*. 179.

Defective construction. In an action for the overflow of a stream caused by the improper construction of a bridge a judgment in a former suit is no bar to a recovery for injuries subsequently sustained. *Chicago, etc., R. Co. v. Schaffer (Ill.)*. 174.

Defective construction. Overflow. Where a bridge is so constructed as to form an unlawful obstruction, and cause an overflow of the river, no right of action accrues to the land owner until he sustains an actual injury caused by such obstruction. *Omaha, etc., R. Co. v. Standen (Neb.)*. 179.

Embankment. Where an embankment as an approach to a bridge across a creek is constructed, the company must leave a sufficient opening for the water flowing along the creek, so as to prevent injury to adjacent lands, but is not bound to provide against damages caused by extraordinary floods. *Gulf, etc., R. Co. v. Pool (Tex.)*. 187.

Federal question. The fact that a State court decided in an action for damages sustained by vessels in navigating a river, that a bridge had not been built as required by Congress, rendered the railroad company liable, irrespective of the question of improper construction, does not present a federal question. *Hannibal & St. Jo. R. Co. v. Missouri R. Packet Co. (U. S.)*. 157.

Interstate commerce. Bridge company incorporated for purpose of constructing bridge across river which forms a boundary line between two States, held, a common carrier within meaning of interstate commerce act, and as such is entitled to facilities from other roads for exchange of traffic. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (I. S. C. C.)*. 630.

Measurement of span. Under act of Congress authorizing construction of bridge across Missouri river, "with spans not less than 160 feet in length," etc., the distance of the spans must be obtained by measuring along a line between the piers drawn perpendicularly to the faces of the piers and the current of the river. *Hannibal & St. Jo. R. Co. v. Missouri R. Packet Co. (U. S.)*. 157.

Overflow. Measure of damages. In an action for injuries to crops through an overflow caused by a bridge embankment, the measure

BRIDGE—Continued.

of damages is the market value of the crops at the time they were destroyed and the injuries to the land. *Gulf, etc., R. Co. v. Pool* (Tex.). 187.

Overflow. Parol evidence to explain judgment. In an action for the overflow of land, caused by the defective construction of a bridge, where the judgment in a former suit, offered in evidence as a bar, does not show the true state of matters, parol evidence may be given in explanation. *Chicago, etc., R. Co. v. Schaffer* (Ill.). 174.

CARRIERS. See BAGGAGE; EXPRESS COMPANIES; INTERSTATE COMMERCE; PASSENGER.**CHILDREN. See PARENT AND CHILD.**

Assessment of damages in causing death of minor children. 93 *n.*

Contributory negligence. If minor, killed while playing on turn-table, had no knowledge that it was unsafe to do so, it cannot be said that he was guilty of contributory negligence. *Union Pac. R. Co. v. Dunden* (Kan.). 88.

Damages. Instruction that plaintiff, who was a minor and living with his mother, would be entitled to recover for diminished capacity to labor, *held*, not a ground for reversal, where there is no complaint that the verdict was not excessive. *Houston, etc., R. Co. v. Boozer* (Tex.). 63.

Death. Value of services. Court commits no error in refusing to require the jury to itemize the value of the probable future services of the intestate minor to his next of kin. *Union Pac. R. Co. v. Dunden* (Kan.). 88.

Trespassers. Children trespassing on railroad track. 87 *n.*

Turn-table, injury to children playing upon. 93 *n.*

CLASSIFICATION. See INTERSTATE COMMERCE.**COMMISSIONERS. See RAILROAD COMMISSIONERS.****CONSTITUTIONAL LAW.**

Eminent domain. By the insertion of the words "or damaged" in the Nebraska constitution, a right to recover for injuries to property was conferred, although no property has been taken. *Omaha, etc., R. Co. v. Standen* (Neb.). 179.

Fares. Regulation by statute. Statute limiting maximum fare for carriage of passengers held not a taking of property without due process of law, although yearly income will be greatly reduced. *Dow v. Biedlman* (U. S.). 322.

Fares. Statute dividing railroads into classes according to length of roads, and fixing different limit for passenger fares for each class, held not to deny equal protection of the laws. *Dow v. Biedlman* (U. S.). 322.

Interstate commerce act. Impairing obligation of contracts. Fact that interstate commerce act incidentally affects contracts existing at the time of its enactment, does not bring it within prohibition against laws which impair the obligation of contracts. *Kentucky & I. Bridge Co. (I. S. C. C.)*. 630.

Presumption of negligence. Statute which declares that, in all cases

CONSTITUTIONAL LAW—Continued.

where passengers are injured, the presumption shall be against company, does not abridge privileges and immunities of a citizen. *Augusta & S. R. Co. v. Randall* (Ga.). 439.

CONSTRUCTION. See **CONTRACT**; **MECHANIC'S LIEN**; **OFFICER**.

CONTRACT. See **TICKETS**.

Construction contracts; interpretation. 126 *n*.

Construction. Delay. Provision in construction contract that, in the event of the contractors failing to employ a sufficient force, company's engineer might employ such number of workmen as would be necessary and charge their wages to the contractors, construed. *Louisville, etc., R. Co. v. Donnegan* (Ind.). 116.

Construction. Incompetency of engineers. Where, owing to negligence and incompetency of company's engineers, statements of work done are incorrect, contractors are entitled to recover what is due them notwithstanding engineers' estimates. *Louisville, etc., R. Co. v. Donnegan* (Ind.). 116.

Construction. Mistake of engineer. Although by a construction contract it is stipulated that the contractors are to be paid for the lineal feet of piling used, the contractor will be entitled to recover for the loss occasioned by the mistake of the engineer in ordering the piling. *Louisville, etc., R. Co. v. Donnegan* (Ind.). 116.

Construction. Stipulation that engineers of company should make final and conclusive estimates does not deprive contractors of the right to resort to the courts for redress of wrong and recovery of dues. *Louisville, etc., R. Co. v. Donnegan* (Ind.). 116.

Construction. Time required. Where the question of time required to complete the work is material, the testimony of railway-builders as to the length of time in which it could be completed is competent. *Louisville, etc., R. Co. v. Donnegan* (Ind.). 116.

Construction. Where a contract specifies that the contractor is to receive a certain sum per mile for stone "hailed by wagon" the company is not bound to pay for the transportation of stone otherwise. *Campbell v. Cincinnati Southern R. Co.* (Ky.). 113.

Death of joint contractor. Under Indiana Code, the whole right in a joint contract vests in the survivors, and such survivors may maintain an action thereon without joining the representatives of the deceased. *Indiana, etc., R. Co. v. Adamson* (Ind.). 127.

Estimates of engineers in construction contracts. 127 *n*.

Modification. A written contract entered into by railway trustees cannot be modified by the construction engineer, nor can he contract verbally with the contractor with reference thereto. *Campbell v. Cincinnati Southern R. Co.* (Ky.). 113.

President of a company has no power, by virtue of his office, to bind the company by a contract for the construction of its road when the same is already under contract by the board of directors. *Templison v. Chicago, etc., R. Co.* (Iowa). 107.

President. Power of the president to bind the corporation. 110 *n*.

Special policeman. Where a company agrees to pay two thirds of the salary of a special policeman, and for some time pays its proportion of his salary directly to him, such officer may maintain an action against the company for arrears of salary, and need not sue the city. *Porter v. Richmond & D. R. Co.* (N. C.) 137.

CONTRACT--Continued.

Stone culvert. Obligations of company agreeing with party conveying and for right of way to construct an embankment along river and maintain a stone culvert so constructed as to permit the escape of overflow water. *Indiana, etc., R. Co. v. Adamson (Ind.)*. 127.

Supplies for boarding-train. In an action for money had and received, it appeared that plaintiff entered into a contract by which defendant's roadmaster was to furnish supplies for a boarding-train. Held, under the circumstances, that plaintiff was estopped from claiming money paid for supplies shipped after the roadmaster was superseded, upon such roadmaster's order. *Hereford v. Southern Pac. R. Co. (Tex.)*. 133.

CONTRACTOR. See **CONTRACT**.

CONTRIBUTORY NEGLIGENCE. See **NEGLIGENCE, CONTRIBUTORY; PARENT AND CHILD; TRESPASSERS.**

CONVEYANCE. See **CONTRACT**.

CROPS. See **SURFACE WATER**.

CROSSING. See **PASSENGER**.

Acquiescence in crossing at place not a highway crossing. 20 *n*.

Bridge over crossing. Where, in *mandamus* proceedings to compel the restoration of a street-crossing, the court found that the plan proposed by the relator was suitable, and the return to the supreme court fails to disclose the evidence upon which such finding is based, it will be presumed that the evidence was sufficient. *State v. St. Paul, etc., R. Co. (Minn.)*. 168.

Bridge. Public conveyance. Where a plan, in *mandamus* proceedings to compel a railroad company to restore a street-crossing, includes a bridge over the tracks of two companies, it must necessarily have reference to the rights of each, and neither can be compelled to surrender its property or change its road further than is reasonably necessary. *State v. St. Paul, etc., R. Co. (Minn.)*. 168.

Deaf person crossing track. 39 *n*.

Double track. Person who started to cross double-track railroad immediately after passage of one train, without looking for approach of another, *held*, guilty of contributory negligence. *Allerton v. Boston & M. R. Co. (Mass.)*. 563.

Muffled ears, crossing track with. 39 *n*.

Pleading. Variance. Recovery cannot be had, under statute conferring right of action where person is injured at crossing and employees neglected to give signal, when counts are founded upon other statutory provisions. *Allerton v. Boston & M. R. Co. (Mass.)*. 563.

Question for jury. Where there is evidence to show that no lookout was kept, and it is not claimed that any warning was given, question whether plaintiff, a minor, used due care in crossing track or whether accident was caused by defendant's negligence, is for the jury. *Houston, etc., R. Co. v. Boozer (Tex.)*. 63.

Speed. An ordinance limiting the rate of speed in passing over crossings does not imply that this rate may not be exceeded between crossings. *Central R. & B. Co. v. Smith (Ga.)*. 1.

CULVERT. See **SURFACE WATER.**

- Alteration of drains.** If a railroad alters an accustomed drain, the substituted outlet must be sufficient to provide for ordinary rainfalls, but need not be constructed in view of extraordinary occurrences. Philadelphia, etc., R. Co. *v.* Davis (Md.). 143.
- Contract for construction.** Obligation imposed upon company under contract with party conveying right of way to construct embankment along a river and maintain a stone culvert so constructed as to permit the escape of overflow water. Indiana, etc., R. Co. *v.* Adamson (Ind.). 127.
- Duty to construct.** Where a railroad constructs an embankment, it is bound to provide culverts so as to allow the escape of waters through them in times of high water as well as low. Ohio & M. R. Co. *v.* Washter (Ill.). 194.
- Insufficient culvert.** Declarations of section-master concerning sufficiency of culvert, not falling within the scope of his duties, are inadmissible in action for overflow. Waldrop *v.* Greenville, etc., R. Co. (S. Car.). 204.
- Liability for damages.** A railroad, by the payment of compensation for injuries caused by the construction of its roadbed, does not escape liability for damages caused by the construction of an insufficient culvert. Ohio & M. R. Co. *v.* Washter (Ill.). 194.
- Owner of land.** In an action for flooding lands in consequence of the stopping up of a culvert, the complaint is insufficient where some of the acts charged are alleged to have occurred since plaintiff became the owner of the land. Terre Haute & I. R. Co. *v.* McCoy (Ind.). 212.

DAMAGES. See **BRIDGE ; DEATH ; SURFACE WATER ; WATER.**

- Evidence of damages.** In an action for injuries to crops caused by defective culvert a nonsuit is properly granted if plaintiff fails to introduce evidence as to the amount of his loss, and an averment in the answer that the plaintiff had agreed to take \$5 in satisfaction is not sufficient to send case to the jury. Waldrop *v.* Greenville, etc., R. Co. (S. Car.). 204.
- Excessive damages for causing death of minor.** 93 *n.*
- Excessive damages for personal injuries.** 456 *n.*
- Excessive.** \$12,000 held not excessive where manager of telegraph company received injuries necessitating amputation of arm, impairing his efficiency as an operator, and putting him to an expense of \$2000. Dougherty *v.* Missouri R. Co. (Mo.). 488.
- Excessive.** \$6933 held not excessive for injuries received by passenger. Houston & T. C. R. Co. *v.* Lee (Tex.). 452.
- Excessive.** \$5000 held not excessive for the death of a brick mason who left a widow and a number of children. Virginia Midland R. Co. *v.* White (Va.). 22.
- Excessive.** \$4,500, verdict for, in favor of parent for injuries to child ten years of age held excessive, child's services not being worth more than \$1100. Hurt *v.* St. Louis, etc., R. Co. (Mo.). 422.
- Excessive.** \$3000 for causing death of minor eleven years old, and who left a poor father, having a wife and three children, is not so excessive as to require a reversal. Union Pac. R. Co. *v.* Dunden (Kan). 88.
- Excessive.** \$500 held not excessive where passenger was wrongfully expelled on dark night and compelled to walk over railroad bridge

DAMAGES—Continued.

half a mile long, and in consequence became sick and lost two weeks' work. *International, etc., R. Co. v. Wilkes (Tex.)*. 331.

Exemplary damages. In action for injury received through negligence of servants, exemplary damages may be recovered where injuries are wanton, although act may not have been previously authorized or subsequently ratified. *Philadelphia Traction Co. v. Orbann (Pa.)*. 432.

Exemplary damages. Instruction in action for personal injuries that facts in evidence to authorize punitive damages must be such as would subject defendant's servant to liability to conviction for criminal negligence is properly refused. *Augusta & S. R. Co. v. Randall (Ga.)*. 439.

Exemplary damages. Newsboy pushed from step of street car by conductor and run over, *held*, not entitled to recover exemplary damages, there being no evidence that the act was wilful or wanton. *Philadelphia Traction Co. v. Orbann (Pa.)*. 432.

Exemplary damages : recovery of, for torts of servants. 439 *n*.

Exemplary damages. See **PASSENGER**.

Infant. Instruction that plaintiff, who was a minor and living with his mother, would be entitled to recover for diminished capacity to labor, *held*, not a ground for reversal where there is no complaint that the verdict was not excessive. *Houston, etc., R. Co. v. Boozer (Tex.)*. 63.

Injuries to crops. See **SURFACE WATER**.

Injuries to crops. In an action for the destruction of crops where plaintiff alleges that crops were owned by himself and his tenant, and that he had obtained his tenant's claim for damages, plaintiff's recovery is limited to such crops as the tenant at the time of the destruction had an interest in, and the evidence of injury must be confined to such crops. *Gulf, etc., R. Co. v. McGowan (Tex.)*. 210.

Knowledge of jury. In assessing damages for wrongful death the jury may use their common knowledge and experience in relation to matters of common observation without direct evidence of the specific pecuniary loss. *Union Pac. R. Co. v. Dunden (Kan.)*. 88.

Occupation of plaintiff. Jury may, in estimating damages, consider occupation of plaintiff. *Ohio & M. R. Co. v. Hecht (Ind.)*. 447.

Opinion of witness, not expert, as to damages not admissible. 428 *n*.

Remote damages. In action for injuries in which only evidence introduced referred to injuries sustained and pain suffered, instruction that "if damages are only imaginary result of tortious act, or other circumstances preponderated largely in causing injury, such damages are too remote to be basis of recovery, and damages traceable to act, but not its legal consequences, are too remote" is properly refused. *Augusta & S. R. Co. v. Randall (Ga.)*. 439.

DEAF MUTE. See **TRESPASSER**.

DEATH. See **PARENT AND CHILD**.

Aggravation of disease. Although person had pneumonia at time of injury and died of it, the injury was the cause of the death if it impaired his strength so as to render disease incurable. *Louisville & N. R. Co. v. Jones (Ala.)*. 417.

Assessment of damages. In assessing damages for wrongful death the jury may use their common knowledge in relation to matters of

DEATH—Continued.

common observation without direct evidence of the specific pecuniary loss. *Union Pac. R. Co. v. Dunden (Kan.)*. 88.

Evidence. Sufficiency. To authorize recovery for negligent killing it is sufficient if there is such preponderance of testimony as produces conviction that death resulted from defendant's negligence. *Louisville & N. R. Co. v. Jones (Ala.)*. 417.

Excessive damages for causing death of minor. 93 *n.*

Excessive damages. \$5000 held not excessive for the death of a brick-mason who left widow and a number of children. *Virginia Midland R. Co. v. White (Va.)*. 22.

Excessive damages. \$3000 for causing the death of minor eleven years old, and who left a poor father having a wife and three children, is not so excessive as to require a reversal. *Union Pac. R. Co. v. Dunden (Kan.)*. 88.

Minors. Assessment of damages in action for death of minor children. 93 *n.*

Minor. Value of services. Court commits no material error in refusing to require the jury to itemize the value of the probable future services of the intestate minor. *Union Pac. R. Co. v. Dunden (Kan.)*. 88.

Previous bad health. Fact that person injured would have recovered if he had not been in bad health at the time the accident occurred will not preclude recovery, if death was not sole result of bad health. *Louisville & N. R. Co. v. Jones (Ala.)*. 417.

Proximate cause. If death of person from pneumonia is contributed to or hastened through negligence of company, it is liable, although death would in any event have supervened. *Louisville & N. R. Co. v. Jones (Ala.)*. 417.

Survival of action. No cause of action survives to administrator for assault by driver of street car upon passenger causing injury resulting in death, but administrator may sue for violation of contract obligation. *Winnegar v. Central Pass. R. Co. (Ky.)*. 462.

Venue. Action may be brought against a railway company to recover damages for wrongful killing in the parish where the damage was done. *Houston v. Vicksburg, etc., R. Co. (La.)*. 76.

DISCRIMINATION. See INTERSTATE COMMERCE.

Passengers. Ticket. Railroad may charge more as fare to those paying on train than it charges for tickets. Reasonable opportunity to procure tickets: what is. *State v. Hungerford (Minn.)*. 265.

DRAINS. See SURFACE WATER.**DRAWING-ROOM CAR. See TICKET.****EMINENT DOMAIN.**

Consequential damages. By the insertion of the words "or damaged" in the Nebraska constitution, a right to recover for injuries to property was conferred, although no property has been taken. *Omaha, etc., R. Co. v. Standen (Neb.)*. 179.

Property injured but not taken. 186 *n.*

ESTOPPEL. See CONTRACT.

34 A. & E. R. R. Cas.—48

EVIDENCE. See MASTER AND SERVANT; STREET RAILWAYS.

Baggage. Value. Custom house inspector cannot testify as to value of personal baggage usually carried by emigrants. *Carlson v. Oceanic Steam Nav. Co.* (N. Y.). 215.

Burden of proof. See PASSENGER.

Competency of the party. In an action to recover damages for the death of a child in which husband and wife are joined as co-plaintiffs, wife is a competent witness. *Reilly v. Hannibal & St. Jo. R. Co.* (Mo.). 81.

Condition of track: evidence admissible as to, in case of accident. 404 n.

Declarations of agent. Where a person acts as a company's agent under such circumstances as to imply knowledge on the company's part, his authority to act is established *prima facie* and his declarations are admissible in evidence. *Indiana, etc., R. Co. v. Adamson* (Ind.). 127.

Declarations of servant. Declarations made by section-master concerning sufficiency of culvert not falling within the scope of his duties are inadmissible in action for overflow of land. *Waldrop v. Greenville, etc., R. Co.* (S. Car.). 204.

Declarations. Pain and suffering. Declarations of party injured with regard to existing pain and suffering or to present condition of body or mind may be shown by any person who heard the same. *Atchison, etc., R. Co. v. Johns* (Kan.). 480.

Defective appliances. In action for injuries to passenger engineer, in relating how the accident happened, may state that the engine boiler leaked steam. *Lakin v. Oregon Pac. R. Co.* (Ore.). 500.

Defective track. Where train was derailed owing to a broken rail, evidence that track, not only at the spot where the accident occurred, but at other places, was defective, is inadmissible. *Pattee v. Chicago, etc., R. Co.* (Dak.). 399.

Derailment. In action for personal injury caused by derailment of train, instruction that derailment proves negligence held erroneous. *Pattee v. Chicago, etc., R. Co.* (Dak.). 399.

Experts. Disease induced by injury. When verdict for plaintiff will not be reversed as contrary to an instruction that the expert's opinion that a result may possibly follow from a certain cause, does not, in the absence of proved facts or circumstances tending to that end, contribute sufficient evidence that such exceptional result did in fact follow. *Quackenbush v. Chicago & N. W. R. Co.* (Iowa). 545.

Expert. In an action upon a construction contract where the question of time required to complete the work is material, the testimony of railway builders is competent. *Louisville, etc., R. Co. v. Donnegan* (Ind.). 116.

Injuries to passenger. Construction of car. For purpose of showing how injury was received, passenger may testify as to construction of car and position in which she was at time of accident. *Lakin v. Oregon Pac. R. Co.* (Ore.). 500.

Intoxication. In an action by a widow to recover for the death of her husband, *held*, that the admission in evidence of plaintiff's remark "that he always went on the track when drunk" was a harmless error. *Hughes v. Galveston, etc., R. Co.* (Tex.). 66.

Medical book. If an extract from a medical book has some bearing upon the extent of injuries and their cause, it ought not to be excluded on the ground that it was too indefinite. *Quackenbush v. Chicago & N. W. R. Co.* (Iowa). 545.

EVIDENCE—Continued.

Opinion. Death of stock. In an action for the death of stock caused by a flood, a witness who has stated his means of information as to the loss may give his opinion as to the number of dead animals. *Sabine & E. T. R. Co. v. Broussard* (Tex.). 199.

Opinion of witness, not expert, as to damages not admissible. 428 *n*.

Opinion. Tariff. Classification. Testimony of persons connected with transportation is not admissible for purpose of explaining terms used in tariff sheet, when goods are inserted by name presumed to be known by the trade. *Hurlburt v. Lake Shore, etc., R. Co.* (I. S. C. C.). 596.

Other accidents. Where passenger on leaving train fell over precipice, evidence that another person had fallen over the same place, although improperly admitted, held not to justify a reversal. *Smith v. Central R. & B. Co.* (Ga.). 456.

Parol evidence to explain judgment. In an action for the overflow of land, caused by the defective construction of a bridge, where the judgment in a former suit offered in evidence as a bar does not show the true state of matters, parol evidence may be given in explanation. *Chicago, etc., R. Co. v. Schaffer* (Ill.). 174.

Personal injuries. Collision between wagon and horse-cars; conflicting evidence as to negligence should be left to the jury. *North Hudson St. R. Co. v. Isley* (N. Y.). 94.

Personal injuries. Evidence that passenger alleged to have been injured had made appointment for next day after he was injured, and that he walked four or five miles to keep it, is admissible. *Stevens v. Central R. & B. Co.* (Ga.). 413.

Profane language. Passenger ejected from train and evidence offered tending to show that he used vile and profane language; evidence in rebuttal held incompetent. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.

Res gestæ: admissibility of declarations made by party injured as part of. 446 *n*.

Res gestæ. Statement made by passenger after she had fallen in alighting from street car, obtained driver's name, gone home, and then gone to her sister's house, cannot be received as part of *res gestæ*, even under Georgia statute. *Augusta & S. R. Co. v. Randall* (Ga.). 439.

EXPRESS COMPANIES.

Messenger: injury to. Defective machinery and negligence in employing servants. 359 *n*.

Messenger. Public policy. Railroad company not being compelled to carry express messenger in baggage car may stipulate for condition to relieve it from liability for accidents and personal injuries. *Bates v. Old Colony R. Co.* (Mass.). 355.

Messenger: stipulation in contract of, that in return for permission to ride in baggage car he should assume all risks, is supported by sufficient consideration. *Bates v. Old Colony R. Co.* (Mass.). 355.

Statutory provision. Construction. Under statute which requires railroads to give reasonable and equal terms and facilities, railroads are not required to carry merchandise and messengers of express companies in baggage cars on reasonable terms equally favorable. *Bates v. Old Colony R. Co.* (Mass.). 355.

FLOODS. See BRIDGE; SURFACE WATERS; WATERS.

FOREIGN CORPORATIONS.

Service of process in action against foreign corporation cannot be made on agent whose authority is limited to soliciting business, although he has been employed to compromise the suit. *Maxwell v. Atchison, etc., R. Co. (C. C.)*. 574.

Service of process on agents of foreign corporation. 580 *n*.

FREE PASS. See PASSENGER.

FREIGHT TRAINS. See PASSENGER.

INTERSTATE COMMERCE.

Bridge company incorporated for purpose of constructing bridge across river which forms boundary line between two States, held, a common carrier within meaning of act, and as such is entitled to facilities from other roads for exchange of traffic. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (I. S. C. C.)*. 630.

Car-load lots. Discrimination. Rate charged for transportation of oil in less than car-load lots, held, not unreasonable when compared with the rate for car-load lots. *Scofield v. Lake Shore, etc., R. Co. (I. S. C. C.)*. 685.

Car rental. Reasonableness. A rate of threefourths of one per cent per mile for rental of cars supplied by another than the carrier is a reasonable rate, having been in use many years and being generally charged by car-furnishing companies. *Scofield v. Lake Shore, etc., R. Co. (I. S. C. C.)*. 685.

Carriage of oil. Danger. Commission will not consider danger from transportation of oil through city in deciding upon reasonableness of rate charged for carriage of oil. *Brady v. Pennsylvania R. Co. (I. S. C. C.)*. 603.

Classification. Agreement with carrier. An assurance made to manufacturer upon his locating at a certain point that the company would carry his goods as belonging to a certain class, has no force in determining to which class the goods belonged. *Hurlburt v. Lake Shore, etc., R. Co. (I. S. C. C.)*. 596.

Classification. Discrimination. Use of different classifications is a violation of fourth section of the act when the effect is to increase revenue from local traffic as compared with through traffic. *Martin v. Southern Pac. R. Co. (I. S. C. C.)*. 612.

Classification. Evidence. Member of railroad committee which prepared official classification cannot testify as to understanding of committee when they prepared it. *Hurlburt v. Lake Shore, etc., R. Co. (I. S. C. C.)*. 596.

Classification. Hub-blocks should be classed as "lumber," and not as "wagon material unfinished." *Hurlburt v. Lake Shore, etc., R. Co. (I. S. C. C.)*. 596.

Classification. Opinion evidence. Expert. Testimony of persons connected with transportation is not admissible for purpose of explaining terms used in tariff sheet when goods are inserted by name presumed to be known by the trade. *Hurlburt v. Lake Shore R. Co. (I. S. C. C.)*. 596.

Competing lines. Distance. Although distance from Lincoln to Chicago by Burlington system is 106 per cent. of distance to Omaha, in estimating freight rates from Chicago to Lincoln, Burlington Co. are not limited to a rate equal to 106 per cent. of rate

INTERSTATE COMMERCE—Continued.

- to Omaha, but may charge an increased rate in view of fact that shorter line competes for traffic. *Lincoln Board of Trade v. Burlington, etc., R. Co.* (I. S. C. C.). 583.
- Connecting lines.** Controlling interest in. One company owning controlling interest in connecting lines cannot make rates from points upon that line which operate as an unjust discrimination in favor of points upon its own lines or upon other lines controlled in similar manner. *Brady v. Pennsylvania R. Co.* (I. S. C. C.). 603.
- Connecting lines.** If companies form through lines operated for continuous carriage, they cannot escape responsibility for unreasonable charges by claiming that haul is divisible according to length of each line. *Brady v. Pennsylvania R. Co.* (I. S. C. C.). 603.
- Constitutional law.** Regulations of interstate commerce act are in nature of police laws, and fact that it affects existing contracts does not bring it within prohibition against laws which impair the obligation of contracts. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (I. S. C. C.). 630.
- Discrimination.** Jurisdiction of commission. Where peaches were shipped from point in New Jersey and addressed to persons in New York but delivered in Jersey City, held, that no point affecting interstate commerce was presented of which commission could take cognizance. *New Fruit Exchange v. Central R. Co.* (I. S. C. C.). 592.
- Exchange of traffic.** Facilities. Fact that railroad has already a number of yards in which it exchanges traffic does not entitle it to refuse facilities to new carrier although such carrier connects at point where there is no yard. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (I. S. C. C.). 630.
- Exchange of traffic.** Public convenience. One railroad cannot refuse to exchange traffic with another on ground that road of latter is not required to supply the public, and that public were sufficiently furnished with means of transportation before such road was built. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (I. S. C. C.). 630.
- Freight rates.** Distance. Competitive lines. 590 *n.*
- Freight rates.** Newly settled country. In view of circumstances, the sparsely settled country, the expense of keeping road open and the conditions of the traffic generally, the rates between St. Peter, Minn., and Pierre, Dak., held, not excessive and the rule that the rate per ton per mile must decrease for the greater distance while total aggregate charges increases is inapplicable. *Business Men's Assoc. v. Chicago & N. W. R. Co.* (I. S. C. C.). 711.
- Local rates.** Competing lines. Under circumstances, held, that the rule, that while the aggregate charge is constantly increasing, the rate per mile per ton should be constantly decreasing did not apply owing to competition which caused adoption of same rates between St. Paul and Lake Superior, on the defendant's road, as those adopted by the St. Paul & Duluth R. *Business Men's Assoc. v. Chicago, St. P., M. & O. R. Co.* (I. S. C. C.). 724.
- Parties to proceedings to adjust tariff.** Manufacturer complaining that goods shipped by him over a railroad to points on other lines are improperly classified need not make connecting lines parties to the proceedings. *Hurlburt v. Lake Shore, etc., R. Co.* (I. S. C. C.). 596.
- Tank cars.** Car-load lots of oil in barrels. Rates charged for oil when

INTERSTATE COMMERCE—Continued.

shipped in barrels in car-load lots, held, to operate unjustly in favor of shippers of oil in bulk in tank cars. Carriers must make rate by weight which should be by the 100 lbs. instead of by the barrel. *Scofield v. Lake Shore, etc., R. Co. (I. S. C. C.).* 685.

Tank cars. Haulage. Carrier may arrange with shipper that the latter shall furnish cars at terms agreed upon, but carrier is charged with duty of seeing that neither directly nor indirectly is a higher rate given to such shipper than to others who are dependent on carrier for cars. *Scofield v. Lake Shore, etc., R. Co. (I. S. C. C.).* 685.

Tank cars. Power of Commission. Interstate commerce commission has no power of directing carrier to supply itself with an equipment of cars, and cannot order company to furnish tank cars to shippers. *Scofield v. Lake Shore, etc., R. Co. (I. S. C. C.).* 685.

Traffic agreement. Competing bridges. One road cannot lawfully refuse to receive traffic brought across a bridge which is a rival with another bridge with which such railroad and another have contracted to transport their traffic across the river, although the traffic brought across the new bridge is in violation of a contract made between the two railroad companies. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (I. S. C. C.).* 630.

Trans-continental lines. Competition. As the Canadian Pacific no longer competes with lines in the United States in transportation from the Pacific to Missouri River points, there is no jurisdiction for higher rates from or to points nearer Pacific, than from or to points on Missouri River. *Martin v. Southern Pac. R. Co. (I. S. C. C.).* 612.

Undue preference. Municipal subscription. Fact that municipal subscriptions and land have been given to railroad cannot be taken into consideration in determining whether a city is discriminated against. *Lincoln Board of Trade v. Burlington, etc., R. Co. (I. S. C. C.).* 583.

JURISDICTION.

Expulsion from train. Cause of action arising for expulsion of passenger arises at the place where the passenger is expelled. *Maxwell v. Atchison, etc., R. Co. (C. C.).* 574.

Federal courts. Personal injuries. Circuit court will not entertain action of tort for recovery of damages for personal injuries when it is obvious that amount of recovery would be less than \$2000. *Maxwell v. Atchison, etc., R. Co. (C. C.).* 574.

Federal question. The fact that a State court decided in an action for damages sustained by vessels in navigating a river that a bridge had not been built as required by Congress, rendered the railroad company liable irrespective of the question of improper construction, does not present a federal question. *Hannibal & St. Jo. R. Co. v. Missouri R. Packet Co. (U. S.).* 157.

LEASE.

Liability of lessor. Railroad has no power to lease its road without statutory authority, and plea by lessor that it had leased the road is not sufficient. *International & G. N. R. Co. v. Underwood. (Tex.).* 570.

LICENSE, SEE TRESPASSER.

LIMITATIONS, STATUTE OF

Passenger. Negligence. Action to recover damages sustained by being thrown from street-car falls within limitation of three years applicable to actions for personal injuries resulting from negligence under New York code. *Webber v. Herkimer & M. St. R. Co.* (N. Y.). 580.

Personal injury, application of statute to action for. 583 *n.*

MASTER AND SERVANT, SEE CONTRACT.

Assaults by servants upon passengers. 380 *n.*

Assault upon passenger. Street car company is liable to passenger for wilful assault upon him by driver of car. *Winnegar v. Central Pass. R. Co.* (Ky.). 462.

Baggage master has no authority to invite or permit persons to ride on train; such permission cannot create relation of carrier and passenger. *Reary v. Louisville, etc. R. Co.* (La.). 277.

Brakeman. Authority. It is within the scope of a brakeman's authority to prevent passengers from getting on train and to remove those wrongfully thereon, but if he does not exercise due care the company is liable. *Kansas City, etc., R. Co. v. Kelley* (Kan.). 281.

Conductor on branch road represents company as to his own route, but not in giving information as to running of trains upon main line. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.

Conductor. Scope of authority. Conductor represents the company in the discharge of his functions; and in the line of his duty, company is liable for any abuse of authority. *Southern Kansas R. Co. v. Rice* (Kan.). 316.

Declarations of servant. Declarations made by section master concerning sufficiency of culvert, not falling within the scope of his duties, are inadmissible in action for overflow of land. *Waldrop v. Greenville, etc., R. Co.* (S. Car.). 204.

Evidence of employment. In an action by a special policeman to recover arrears of salary, where the defendant claims that during a certain period plaintiff had not been recognized as a special policeman a letter directed to him during such period by the company's yard master is admissible. *Porter v. Richmond & D. R. Co.* (N. Car.). 137.

Exemplary damages. Newsboy pushed from step of street car by conductor and run over, *held* not entitled to recover exemplary damages, there being no evidence that the act was wilful or wanton. *Philadelphia Traction Co. v. Orbann* (Pa.). 432.

Exemplary damages: recovery of, for torts of servants. 439 *n.*

Newsboy selling papers on street car not an employee on or about the road within meaning of Pennsylvania statute. *Philadelphia Traction Co. v. Orbann* (Pa.). 432.

Persons "engaged or employed on or about roads," etc., who are within meaning of Pennsylvania statute. 439 *n.*

Risks assumed by servant. 276 *n.*

Risk of employment. If through neglect to keep track in suitable repair an injury occurs to one lawfully on the train, and without fault of his own, he may recover. *Rosenbaum v. St. Paul, etc., R. Co.* (Minn.). 274.

Scope of authority. Company is responsible to passenger for injuries

MASTER AND SERVANT—Continued.

- caused by negligence of engineer "learning the road," although he had been placed on engine by material agent who had no authority to employ any person. *Lakin v. Oregon Pac. R. Co. (Ore.)*. 500.
- Scope of employment. Instructions. An instruction in an action for injuries caused by company's servants that if employees permitted engine to be moved without consent of engineer, whether within the scope of their employment or not, the company would not be liable for the injuries, *held* not a ground for reversal. *Lakin v. Oregon Pac. R. Co. (Ore.)*. 500.
- Scope of employment. Presumption. Where servants are on company's premises performing duty for company as they had on other occasions, it will be presumed that they were acting within the scope of the authority given them. *Atchison, etc., R. Co. v. Johns (Kan.)*. 480.
- Special finding by jury, in action for servant's tort that he was not acting in the course of his employment, is a conclusion of law and may be set aside. *Fick v. Chicago, etc., R. Co. (Wis.)*. 378.
- Ticket agent. Assault. Person left in charge of office during absence of regular agent is a servant of the company, which is liable for an assault committed by him. *Fick v. Chicago, etc., R. Co. (Wis.)*. 378.
- Torts of servants. Exemplary damages. In action for injury received through negligence of servants, exemplary damages may be recovered where injuries are wanton, although act may not have been previously authorized or subsequently ratified. *Philadelphia Traction Co. v. Orbann (Pa.)*. 432.
- Unskilful employee. In an action against a street railway company for personal injuries caused by driver's negligence, instruction as to failure of defendant to employ prudent drivers *held* argumentative and improper. *Hays v. Gainesville St. R. Co. (Tex.)*. 97.

MECHANIC'S LIEN.

- Sale of road before construction. Where one company sells its road to another before completion, and enters into a contract to complete it, a third person with whom it enters into a contract for work stands in the relation of a sub-contractor and is entitled to a lien only in the event of his complying with the statute. *Templison v. Chicago, etc., R. Co. (Iowa)*. 107.
- Sub-contractors. Where one company sells its road to another and enters into a contract with a third party for the construction of the track, such third party cannot acquire a lien for material and labor against the purchasing company unless they are sub-contractors. *Templison v. Chicago, etc., R. Co. (Iowa)*. 107.

NEGLIGENCE. See BRIDGE; DEATH; MASTER AND SERVANT; PASSENGER; STREET RAILWAY; SURFACE WATER; TRESPASSERS; WATER.

- Active and passive negligence. 21 *n.*
- Comparative negligence: doctrine of, has never been recognized in Missouri. *Hurt v. St. Louis, etc., R. Co. (Mo.)*. 422.
- Due care. Evidence of positive act. Where an employee in an elevator was found lying dead across the track soon after cars had been sent violently into the building, *held*, that the case was not one in which it was necessary to show some positive act of the intestate in order

NEGLIGENCE—Continued.

to prove that he exercised due care. *Maguire v. Fitchburg R. Co.* (Mass.). 9.

Gross negligence. Averment that plaintiff was injured through defendant's "gross negligence" will not limit plaintiff's right to recover for an injury inflicted by the wilful act of another. *Hays v. Gainesville St. R. Co.* (Tex.). 97.

Instruction precluding plaintiff from recovering for injuries unless he exercised prudence to avoid the injury is erroneous, there being no rule of law which requires him to use more than ordinary caution to shield himself from the consequences of contributory negligence. *Hays v. Gainesville St. R. Co.* (Tex.). 97.

Omission of statutory duty as affecting company's liability. 5 *n.*

Omission of statutory duty. Where an act is expressly enjoined by statute the act is within all degrees of diligence, even the very lowest, and its omission is negligence *per se*. *Central R. & B. Co. v. Smith* (Ga.). 1.

NEGLIGENCE, CONTRIBUTORY.

Instruction as to effect of plaintiff's contributory negligence and defendant's negligence, held not open to objection that it charged that even if negligence of plaintiff as well as defendant contributed to injury, defendant is liable. *Dougherty v. Missouri R. Co.* (Mo.). 488.

Instructions. If other instructions sufficiently instruct jury as to effect of contributory negligence, instruction that if jury find defendant negligent, they must find for plaintiff, is not such as to warrant a reversal. *Dougherty v. Missouri R. Co.* (Mo.). 488.

Instruction that it was not enough that plaintiff may not have used ordinary care, but such want of care must have contributed to the injury to bar recovery, held not erroneous. *Ohio & M. R. Co. v. Hecht* (Ind.). 447.

Knowledge of danger will not impute contributory negligence. 9 *n.*

Knowledge of defects. A person crossing a bridge is not guilty of negligence contributing to injury caused by defects in such bridge although he attempted to cross in the knowledge of such defects. *Gulf C. & S. F. R. Co. v. Gascamp* (Tex.). 6.

Liability notwithstanding. If by the exercise of reasonable care on the part of the company an accident might have been avoided, the company is liable notwithstanding the contributory negligence of the plaintiff. *Troy v. Cape Fear, etc., R. Co.* (N. Car.). 13.

Liability notwithstanding. Plaintiff may recover for personal injuries even though guilty of contributory negligence, if defendant could have avoided injuring him by the use of such means as a prudent man would have employed. *Hays v. Gainesville St. R. Co.* (Tex.). 97.

Recovery notwithstanding contributory negligence. 102 *n.*

Recovery under statute. Under Georgia statute giving a right to recover partial damages where person injured has been guilty of contributory negligence, plaintiff cannot recover if he has trespassed upon track and been grossly negligent. *Central R. & B. Co. v. Smith* (Ga.). 1.

NUISANCE.

Defective bridge. Where the erection of a bridge causing overflows is a continuing nuisance, in consequence of which a recovery is limited to damages accrued, a judgment in one action is no bar to a second action. *Omaha, etc., R. Co. v. Standen* (Neb.). 179.

OFFICER. See **CONTRACT.**

Construction engineer has no power to contract verbally with a contractor with reference to a written contract entered into by the trustees of a railway nor can he modify such contract. *Campbell v. Cincinnati Southern R. Co. (Ky.)*. 113.

President of a railroad company has no power by virtue of his office to bind the company by a contract for the construction of its railroad when the same is under contract by the board of directors. *Temp-lison v. Chicago, etc., R. Co. (Iowa)*. 107.

President. Power of the president to bind the corporation. 110 *n*.

PARENT AND CHILD. See **CHILDREN.**

Contributory negligence of parent as bar to child's recovery. 80 *n*.

Contributory negligence. Whether the act of the mother in leaving her child while he was eating, so that in her absence he strayed out of the house, was or was not negligence on her part, *held* a question for the jury. *Reilly v. Hannibal & St. Jo. R. Co. (Mo.)*. 81.

Damages. Excessive. Verdict of \$4500 in favor of parent for injuries to child ten years of age *held* excessive, child's services not being worth more than \$1100. *Hurt v. St. Louis, etc., R. Co. (Mo.)*. 422.

Injuries. Opinion as to damages. In action for injury to child, parent cannot state his opinion of amount he is damaged. *Hurt v. St. Louis, etc., R. Co. (Mo.)*. 422.

Negligence of parent. In an action for the death of child, where it appears that the child was killed at the same time as its mother, and that the deaths were caused by the failure of the mother to exercise care, there can be no recovery. *Houston v. Vicksburgh, etc., R. Co. (La.)*. 76.

PASSENGER. See **BAGGAGE; SLEEPING CAR COMPANY; TICKETS.**

Aggravation of disease. Although person had pneumonia at time of injury and died of it, the injury was the cause of the death if it impaired his strength so as to render disease incurable. *Louisville & N. R. Co. v. Jones (Ala.)*. 417.

Alighting. Contributory negligence. Where passenger was injured in alighting from a train, instruction that jury may take into consideration the excitement under which act was done, *held* properly refused. *Covington v. Western & A. R. Co. (Ga.)*. 469.

Alighting. Dangerous place. Where train arrived at its destination at midnight, and passenger, on leaving train, stepped over a high wall where no light was furnished, he is entitled to recover for the injury received. *Smith v. Central R. & B. Co. (Ga.)*. 456.

Alighting. Duty to stop train reasonable time to allow passenger to alight. 375 *n*.

Alighting. Reasonable time. Passenger receiving injury caused by running switch engine against passenger car is entitled to recover, if reasonable time had not been allowed for him to alight. *East Line R. Co. v. Rushing (Tex.)*. 367.

Arm on window sill. Testimony that passenger rested his arm upon the sill of a window, and that his arm was struck by some substance from a passing train, raises presumption of want of proper care on part of company, and in absence of explanation, verdict for plaintiff will be sustained. *Breen v. New York, etc., R. Co. (N. Y.)*. 523.

Arm resting on window sill: injuries to passenger riding with. 526 *n*.

PASSENGER—Continued.

Arrest. If passenger is disorderly policeman may arrest him notwithstanding fact that such policeman was originally called in as the agent of the company, and for violence incident to such arrest company is not liable. *Jardine v. Cornell* (N. J.). 307.

Arrest of passenger. 311 *n.*

Arrest. Where police officer takes disorderly person to police station, such action will be presumed to have been done by virtue of his official character, and company is not liable. *Jardine v. Cornell* (N. J.). 307.

Assaults by fellow-passengers and trespasser. 386 *n.*

Assault by servants. Scope of employment. Street car company is liable to passenger for a wilful assault upon him by driver. *Winnegar v. Central Pass. R. Co.* (Ky.). 462.

Assaults by servants upon passengers. 380 *n.*

Assault by stranger. Person knocked off of platform and robbed by person not shown to be servant of company, held not entitled to recover under petition charging assault by employees. *Sachrowitz v. Atchison, etc., R. Co.* (Kan.). 382.

Assault by street car driver upon passenger, causing injury resulting in death, cause of action does not survive to administrator, but administrator may sue for violation of contract obligation. *Winnegar v. Central Pass. R. Co.* (Ky.). 462.

Assault. Cause of action held to be pleaded as one in tort; gravamen of complaint being an intentional assault and fact that plaintiff was a trespasser constituted neither failure of proof nor material variance. *Mykelby v. Chicago, etc., R. Co.* (Minn.). 387.

Assault. Ticket agent. Person left in charge of office during absence of regular agent is a servant of the company, which is liable for an assault committed by him. *Fick v. Chicago, etc., R. Co.* (Wis.). 378.

Assumption of risk. Person riding on gravel train over side track is deemed to accept the risks incident to such train and track of that character. *Rosenbaum v. St. Paul, etc., R. Co.* (Minn.). 274.

Baggage on platform. Injury. Where passenger was injured by servants of company sliding trunk against him while loading it in baggage car, held that the evidence proved negligence on the part of the company's servants. *Atchison, etc., R. Co. v. Johns* (Kan.). 480.

Boarding moving street car. Although person is guilty of negligence in attempting to get on car, if driver was notified that he had fallen and could have avoided the injury, company is liable. *Woodward v. West Side St. R. Co.* (Wis.). 472.

Boarding moving street car. Condition of track. Where passenger was injured in attempting to board moving street car, question as to whether driver exercised due diligence, and whether car slipped after brakes were set, owing to condition of track, is for jury. Instruction given held erroneous, *Woodward v. West Side St. R. Co.* (Wis.). 472.

Brakeman. Authority. It is within the scope of a brakeman's authority to prevent passengers from getting on train and to remove those wrongfully thereon, but if he does not exercise due care the company is liable. *Kansas City, etc., R. Co. v. Kelley* (Kan.). 281.

Burden of proof cast upon carrier in case of accident. 413 *n.*

Burden of proof. In case of injury caused by derailment when plaintiff's evidence raises presumption of negligence burden of proving

PASSENGER—Continued.

- that accident was not caused by negligence rests with company. What it should prove. *Pershing v. Chicago, etc., R. Co. (Iowa)*. 405.
- Changing coaches.** Passenger who has taken wrong train, and is informed that by taking rear car he could get off at a station beyond and return to his destination, and attempts to pass to such car, does so at his own risk. *Stewart v. Boston & P. R. Co. (Mass.)*. 499.
- Collision of street car with other vehicle.** Where car driven with unusual speed was struck by pole of a truck with sufficient force to throw passenger from his seat and inflict injuries, evidence held sufficient to raise presumption that car was driven negligently. *Hill v. Ninth Ave. St. R. Co (N. Y.)* 522.
- Collision:** presumption of negligence in case of. 399 *n.*
- Collision.** Presumption of negligence. Proof of collision injuring passenger imposes on company burden of proving that it did not occur by reason of failure to exercise due care. *Graham v. Burlington, etc., R. Co. (Minn.)*. 397.
- Collision with other vehicles:** injuries to street car passenger by. 523 *n.*
- Complaint.** Amendment to petition for damages for injuries sustained by passenger concerning character of street car horses and jerk in starting car, held not to substitute new cause of action. *Dougherty v. Missouri R. Co. (Mo.)*. 488.
- Condition of track:** evidence admissible as to, in case of accident. 404 *n.*
- Conductor of train** is only charged with duty of carrying passenger safely to his destination, announcing arrival of train, and giving him opportunity to leave cars. *Hurt v. St. Louis, etc., R. Co. (Mo.)*. 422.
- Conductor on branch road** represents company as to his own route, but not in giving information as to running of trains upon main line. *Atchison, etc., R. Co. v. Gants (Kan.)*. 290.
- Conductor.** Scope of authority. Conductor represents the company in the discharge of his functions; and in the line of his duty company is liable for any abuse of authority. *Southern Kansas R. Co. v. Rice (Kan.)*. 316.
- Construction train.** Presumption that one permitted by an employee to ride on construction train is not lawfully there may be overcome by special circumstances. *Rosenbaum v. St. Paul, etc., R. Co. (Minn.)*. 274.
- Contributory negligence.** Crossing track. Passenger upon leaving train attempted to cross track which passengers had been accustomed to cross, and was struck by another train, held that question whether he exercised due care was for jury. *Robostelli v. New York & H. R. Co. (C. C.)*. 515.
- Contributory negligence.** Crossing track. Person who started to cross double track railroad immediately after passage of one train without looking for approach of another, held guilty of contributory negligence. *Allerton v. Boston & M. R. Co. (Mass.)*. 563.
- Contributory negligence.** Instruction as to effect of plaintiff's contributory negligence and the defendant's negligence, held not open to objection that it charged that even if negligence of plaintiff as well as defendant contributed to injury, defendant is liable. *Dougherty v. Missouri R. Co. (Mo.)*. 488.
- Contributory negligence.** Instruction in action to recover for injuries received upon street-car, that if it appeared that accident would not

PASSENGER—Continued.

- have happened if plaintiff had taken certain precautions, yet, if jury believe he acted with reasonable care and was using all the diligence required, held not to require a reversal as giving undue prominence to special acts of negligence on plaintiff's part. *Dougherty v. Missouri R. Co. (Mo.)*. 488.
- Contributory negligence.** Mixed freight and passenger train. Passenger who sits on arm of one seat with elbow on back of the seat is guilty of negligence contributing to injuries received through being thrown against seat by a shock in coupling the train. *Smith v. Richmond & D. R. Co. (N. Car.)*. 557.
- Contributory negligence.** Passenger who returns to train which has stopped to allow passengers to dine, before conductor has called upon passengers to re-enter cars, is not guilty of negligence contributing to injuries sustained before other passengers had been required to board train. *Lakin v. Oregon Pac. R. Co. (Ore.)*. 500.
- Contributory negligence.** Standing on foot board of street-car. Passenger standing on foot board of street-car and injured by coming in contact with passenger standing on foot board of passing car, held not guilty of contributory negligence. *City R. Co. v. Lee (N. J.)*. 566.
- Contributory negligence.** Standing on platform. Old lady who had accompanied friends to station, and after bidding them good-bye, stood for a few minutes on station platform to see train start, is not thereby guilty of such contributory negligence as would prevent her from recovering for injuries received. *Atchison, etc., R. Co. v. Johns (Kan.)*. 480.
- Contributory negligence.** Switching. Passenger knowing that train is switching and that car would probably be backed against the part of the train to which caboose is attached and who stands up in the car and is thrown down and injured is guilty of contributory negligence. *Wallace v. Western N. Car. R. Co. (N. Car.)*. 553.
- Crossing track.** Instruction. In action for death of passenger killed by a passing train while crossing adjoining track, a juror asked whether the fact that the passenger had previously got off safely on same side of train would give him right to get off there again; court replied that this was referred to the jury, *held*, that the answer was not misleading in view of previous instructions. *Robostelli v. New York & H. R. Co. (C. C.)*. 515.
- Crowding street cars.** Passengers on platform. Where a street railway undertakes to carry large crowds vastly in excess of seating capacity of cars, and cars are run so near intersection of switch that they cannot pass safely, company is guilty of gross negligence. *Topeka City R. Co. v. Higgs (Kan.)*. 529.
- Damages: excessive.** \$6933 held not excessive where passenger had ribs broken and spine injured in accident. *Houston & T. C. R. Co. v. Lee (Tex.)*. 452.
- Damages: exemplary.** Instruction, in action for personal injuries that facts in evidence to authorize punitive damages must be such as would subject defendant's servant to liability to conviction for criminal negligence, is properly refused. *Augusta & S. R. Co. v. Randall (Ga.)*. 439.
- Damages.** Occupation of plaintiff. Jury may, in estimating damages, consider occupation of plaintiff. *Ohio & M. R. Co. v. Hecht (Ind.)*. 447.
- Death.** Proximate cause. If death of person from pneumonia is con-

PASSENGER—Continued.

- tributed to or hastened through negligence of company, it is liable, although death would in any event have supervened. *Louisville & N. R. Co. v. Jones* (Ala.). 417.
- Defective track.** Evidence. Where train was derailed owing to a broken rail, evidence that track, not only at the spot where the accident occurred, but at other places, was defective is inadmissible. *Pattee v. Chicago, etc., R. Co.* (Dak.). 399.
- Degree of care.** Carrier of passengers is bound to exercise highest degree of care for convenience and safety of passengers, and is liable for slightest neglect. *Pershing v. Chicago, etc., R. Co.* (Iowa). 405.
- Degree of care required.** To method of carrying passengers for hire must be applied the greatest skill, care, and foresight of which carriers are in their nature susceptible. *Topeka City R. Co. v. Higgs* (Kan.). 529.
- Degree of care.** Street railways are bound to exercise the greatest skill, care, and foresight of which they are in their nature susceptible to avoid liability for injuries occasioned by their operation. *Topeka City R. Co. v. Higgs* (Kan.). 529.
- Derailement.** Evidence that train was running at high speed, and that ties were rotten and road-bed unsafe, owing to which train was thrown from track and passenger injured, *held* sufficient to support verdict for plaintiff. *Houston & T. C. R. Co. v. Lee* (Tex.). 452.
- Derailement.** In action for personal injury, caused by derailment of train, instruction that derailment proves negligence *held* erroneous. *Pattee v. Chicago, etc., R. Co.* (Dak.). 399.
- Derailement:** presumption of negligence in case of. 404 *n.*
- Discrimination.** A railroad may charge more to those paying fare on train than it charges for tickets. *State v. Hungerford* (Minn.). 265.
- Disease induced by injury.** Plaintiff was thrown from his seat against the stove of the car, hurting his nose and, as plaintiff claimed, causing catarrh. Instruction as to sufficiency of evidence considered. *Quackenbush v. Chicago & N. W. R. Co.* (Iowa). 545.
- Disease induced by injury.** Sufficiency of evidence. When verdict for plaintiff will not be reversed as contrary to an instruction that an expert's opinion that a result may possibly follow from a certain cause, does not contribute sufficient evidence that such exceptional result did in fact follow. *Quackenbush v. Chicago & N. W. R. Co.* (Iowa). 545.
- Diseased or disabled persons:** injury to. 375 *n.*
- Duty of carrier.** The exercise of utmost foresight, knowledge, and care is required of all carriers of passengers, and not merely of railroads operated by steam. *Dougherty v. Missouri R. Co.* (Mo.). 488.
- Duty of company.** "All possible skill and care" and "all possible foresight" defined. *Topeka City R. Co. v. Higgs* (Kan.). 529.
- Engineer learning road.** Company is responsible to passenger for injuries caused through negligence of engineer placed upon engine to "learn the road" by material agent, although the latter had no authority to employ any person. *Lakin v. Oregon Pacific R. Co.* (Ore.). 500.
- Evidence as to construction of car.** Position of plaintiff. For purpose of showing how injuries were received, passenger may testify as to construction of car, and position in which she was at the time. *Lakin v. Oregon Pac. R. Co.* (Ore.). 500.
- Evidence.** Defective appliance. Engineer, in course of his narration

PASSENGER—Continued.

- of how accident happened, may state that the engine boiler leaked steam. *Lakin v. Oregon Pac. R. Co. (Ore.)*. 500.
- Evidence of other accidents.** Where passenger on leaving train fell over precipice, evidence that another person had fallen over the same place, although improperly admitted, held not to justify a reversal. *Smith v. Central R. & B. Co. (Ga.)*. 456.
- Evidence. *Res gestæ*.** Statement made by passenger after she had fallen in alighting from street car, obtained driver's name, gone home and then gone to her sister's house cannot be received as part of *res gestæ* even under Georgia statute. *Augusta & S. R. Co. v. Randall (Ga.)*. 439.
- Exemplary damages.** In action for injury received through negligence of servants, exemplary damages may be recovered where injuries are wanton, although act may not have been previously authorized or subsequently ratified. *Philadelphia Traction Co. v. Orbann (Pa.)*. 432.
- Express messenger: injury to.** Defective machinery and negligence in employing servants. 359 *n*.
- Express messenger. Public policy.** Railroad company not being compelled to carry express messenger in baggage car, may stipulate for condition to relieve it from liability for accidents and personal injuries. *Bates v. Old Colony R. Co. (Mass.)*. 355.
- Express messenger: stipulation with, that, in return for permission to ride, he should assume all risk is supported by sufficient consideration.** *Bates v. Old Colony R. Co. (Mass.)*. 355.
- Expulsion. See FREIGHT TRAIN, *infra*.**
- Expulsion. Abusive language; passenger ejected may recover damages therefor on account of injury to his feelings, but cannot also recover because words used tended to bring him into ignominy.** *Southern Kansas R. Co. v. Hinsdale (Kan.)*. 256.
- Expulsion. Arkansas statute requiring expulsion of passengers only at stations has no application in case of a person unlawfully on a freight train.** *Hobbs v. Texas & P. R. Co. (Ark.)*. 268.
- Expulsion. Assistance of passengers. Where person is expelled with assistance of other passengers who used malicious force, company may be liable therefor; otherwise, however, if passengers were mere interlopers, and conductor had no opportunity to interfere.** *Atchison, etc., R. Co. v. Gants (Kan.)*. 290.
- Expulsion. Excessive damages. Where passenger was expelled on a dark night, and compelled to walk over bridge half a mile long and became sick, etc., \$500 held not excessive.** *International, etc., R. Co. v. Wilkes (Tex.)*. 331.
- Expulsion. Exemplary damages. Where passenger, unable to purchase ticket on account of office being closed, refused to pay additional fare demanded by conductor, who instead of expelling him when requested to do so near the passenger's home, carried him further and expelled him where he was left without shelter, he is entitled to exemplary damages.** *Hall v. South Carolina R. Co. (S. Car.)*. 311.
- Expulsion. Exemplary damages. Where there is reckless indifference to rights of passenger on part of conductor in examining ticket and in ejecting him from car, he is entitled to recover exemplary damages.** *Southern Kansas R. Co. v. Rice (Kan.)*. 316.
- Expulsion. Invitation of force. Passenger on wrong train, owing to mistake of ticket agent, must either pay fare or get off, and cannot invite force in his removal merely to make a case against the com-**

PASSENGER—Continued.

- pany or to increase his damages. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Expulsion.** Jurisdiction of action. Cause of action arising from wrongful expulsion of passenger arises at place where passenger was expelled. *Maxwell v. Atchison, etc., R. Co. (C. C.)*. 574.
- Expulsion.** Measure of damages recoverable by person who has a valid ticket, but is expelled by conductor, who informs him that his ticket will not be honored, and then borrows money at station where he is expelled, which is accepted by the conductor and resumes his journey. *Southern Kansas R. Co. v. Rice* (Kan.). 316.
- Expulsion.** Negligence in the expulsion of trespassers from trains. 285 *n*.
- Expulsion of passenger for refusal to deliver ticket or pay fare.** 311 *n*.
- Expulsion of passenger for refusal to pay full fare.** 268 *n*.
- Expulsion of trespassers from train.** Negligence. 285 *n*.
- Expulsion of trespasser.** Where boy wrongfully on freight train is commanded by brakeman to jump off while train is in motion, and he obeys, through fear of being thrown off, and is injured, company is liable. *Kansas City, etc., R. Co. v. Kelley* (Kan.). 281.
- Expulsion of trespasser.** Trespasser may be ejected at any suitable place, but unnecessary force or excessive violence should not be used. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Expulsion of trespasser.** Where trespasser forcibly resists ejection, he cannot recover for force in overcoming his resistance. Company is only liable for such excessive violence as is wilful or malicious. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Expulsion.** Police officer who assists in ejecting passenger becomes special agent of company and is subject to rule in regard to excessive violence. *Jardine v. Cornell* (N. J.). 307.
- Expulsion.** Profane language. Passenger ejected from train, and evidence offered tending to show that he used vile and profane language; evidence in rebuttal held incompetent. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Expulsion:** right of, for non-compliance with rule requiring passengers on freight train to be supplied with tickets, may be exercised at any suitable place. *Southern Kansas R. Co. v. Hinsdale* (Kan.). 256.
- Expulsion.** Station. Railroad having right to eject one not a passenger must do so at a regular station. *Hardenbergh v. St. Paul, etc., R. Co. (Minn.)*. 359.
- Expulsion.** Suitable place. If passenger is expelled at unseasonable hour at a place where he was exposed to the weather, these facts may be taken into consideration in computing damages. *Hall v. South Carolina R. Co. (S. Car.)*. 311.
- Expulsion.** Trespasser may be ejected at place other than station provided care is taken not to expose him to serious injury, but company need not have consideration for his mere convenience. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Expulsion.** Unnecessary violence. Passenger not provided with ticket who refuses to pay fare may be forcibly ejected, but if more violence is used than is necessary, company is liable. *Jardine v. Cornell* (N. J.). 307.
- Expulsion.** When ejected passenger is entitled to exemplary damages. 316 *n*.
- Fares.** Regulation by statute. Statute limiting maximum fare for carriage of passengers, *held* not a taking of property without due pro-

PASSENGER—Continued.

cess of law, although yearly income will be greatly reduced. *Dow v. Biedlman* (U. S.). 322.

Fares. Statute dividing railroads into classes according to length of roads, and fixing different limit for passenger fares for each class, *held* not to deny equal protection of the laws. *Dow v. Biedlman* (U. S.). 322.

Former injuries. Instruction that if plaintiff had been previously injured, and was so recovered that with ordinary care he would have gotten well, and that he was hurt by defendant's negligence so as to aggravate the old injury, *held* proper. *East Line R. Co. v. Rushing* (Tex.). 367.

Free pass: injuries to passengers riding on. 354 *n*.

Free pass. Stipulation not exempting company from liability is not abrogated by purchase of ticket for drawing-room car. *Ulrich v. New York, etc., R. Co.* (N. Y.). 350.

Freight train. See CONTRIBUTORY NEGLIGENCE, *supra*.

Freight train. Announcement of rule requiring passengers on freight train to procure tickets, *held* to give it sufficient publicity, and passenger could be expelled for non-compliance. *Southern Kansas R. Co. v. Hinsdale* (Kan.). 256.

Freight train. Conductor may require passenger who is not supplied with ticket, as required by rule, to leave the train when he has no right to accept fare. *Southern Kansas R. Co. v. Hinsdale* (Kan.). 256.

Freight train. Contributory negligence. Dangers incident to travelling by rail are greater on freight than on passenger trains, and call for a corresponding higher degree of care on part of passenger. *Wallace v. Western N. Car. R. Co.* (N. Car.). 553.

Freight train: fact that regulation prohibiting carrying passengers on, has been violated does not deprive company of right to enforce the regulation. *Hobbs v. Texas & P. R. Co.* (Ark.). 268.

Freight train: notice of change requiring procuring of tickets before entering. 264 *n*.

Freight train. Person who boards freight train which has no appearance of being for the accommodation of passengers may lawfully be ejected. *Hobbs v. Texas & P. R. Co.* (Ark.). 268.

Freight train. Place for alighting. If railroad carries passengers on freight trains, it is responsible for injuries caused by setting them down at dangerous place at night. *Smith v. Central R. & B. Co.* (Ga.). 456.

Freight train: procuring tickets before entering. 264 *n*.

Freight train. Railway has power to make regulations requiring persons desiring to ride on freight trains to be provided with tickets. *Southern Kansas R. Co. v. Hinsdale* (Kan.). 256.

Freight train. Reasonable opportunity to obtain ticket. 264 *n*.

Freight train. Right to travel on. 263 *n*.

Freight train. Rule requiring passengers to be provided with tickets; evidence of non-enforcement of. 264 *n*.

Freight train. Stopping-place. Company carrying passengers on freight train is bound to set them down at regular passenger stations, and passenger who is carried past destination and ejected has cause of action. *White Water Valley R. Co. v. Butler* (Ind.). 467.

Freight train. Sufficiency of effort to procure ticket. 264 *n*.

Freight train: where possession of ticket is essential to enable passenger to ride on, company must furnish convenient facilities for

PASSENGER—Continued.

- purchase of tickets. *Southern Kansas R. Co. v. Hinsdale (Kan.)*. 256.
- Gravel train: grader riding upon, with consent of conductor, *held* not a mere trespasser, and that defendant was responsible for defects in track. *Rosenbaum v. St. Paul, etc., R. Co. (Minn.)*. 274.
- Injuries. Evidence that passenger alleged to have been injured had made appointment for next day after he was injured, and that he walked four or five miles to keep it, is admissible. *Stevens v. Central R. & B. Co. (Ga.)*. 413.
- Injuries. Instruction as to right of plaintiff to recover for personal injury held to amount to charge that jury were to consider whole evidence, and did not lead jury to believe that they were to find for plaintiff if he showed, by evidence of his own witnesses, that his condition was the result of injuries received in the accident. *Gulf, etc., R. Co. v. Mannewitz (Tex.)*. 428.
- Injuries. Pleading. Allegation in pleading that plaintiff was "injured in spine, chest, head, etc.," held sufficiently comprehensive to embrace heart disease. *Gulf, etc., R. Co. v. Mannewitz (Tex.)*. 428.
- Injury to passenger taking or leaving a train. 521 *n*.
- Inquiries as to stoppages. It is the duty of a person about to take passage to inform himself as to stoppages according to the regulations of the company. *Atchison, etc., R. Co. v. Gants (Kan.)*. 290.
- Invalids. Degree of care. Company must exercise such care as will avoid injuring persons in feeble health. *East Line, etc., R. Co. v. Rushing (Tex.)*. 367.
- Invalid person: injury to. Aggravation of disease. 422 *n*.
- Jerk. Company is liable for injury caused to person in feeble health by his being thrown across the seats of a car by a sudden jerk. *East Line R. Co. v. Rushing (Tex.)*. 367.
- Jerk. In action for injury to passenger caused by running switch engine against car, evidence that conductor had left train, and that brakeman making coupling gave no warning, is sufficient to justify submission of question of gross negligence to jury. *East Line R. Co. v. Rushing (Tex.)*. 367.
- Jerk. Unnecessary shock. Where passenger is thrown from his seat and injured by a number of loaded cars suddenly coming against the car in which he is seated, company is liable. *Quackenbush v. Chicago & N. W. R. Co. (Iowa)*. 545.
- Jerking passenger from step. Passenger was jerked from step of street car, alighted safely on his feet, and was there after struck by a runaway. *Held*, that being struck by the runaway and not being jerked from the step was the proximate cause of the injury. *South Side R. Co. v. Trich (Pa.)*. 549.
- Jumping from moving train by person in fear. 281 *n*.
- Jumping from moving train. Failure to stop. Instruction that if train was not stopped, and passenger jumped off when it was unsafe to do so and was injured, he cannot recover, *held* erroneous, question of plaintiff's negligence being for jury. *Covington v. Western & A. R. Co. (Ga.)*. 469.
- Jumping from train. Panic. Railway is not liable to person who, in state of panic, jumps from train and is injured thereby, where fear was not occasioned by act of company's employee. *Reary v. Louisville, etc., R. Co. (La.)*. 277.
- Limitation of action. Action to recover damages sustained by being thrown from street car falls within limitation of three years applicable to actions for personal injuries resulting from negligence under

PASSENGER—Continued.

- New York Code. *Webber v. Herkimer & M. St. R. Co.* (N. Y.) 580.
- Medical treatment. Testimony of physician that plaintiff disobeyed his instructions *held* not sufficient to call for charge limiting recovery to such damages only as he would have sustained had he followed instruction. *Gulf, etc., R. Co. v. Mannewitz* (Tex.). 428.
- Newsboy pushed from step of street car by conductor and run over, *held* not entitled to recover exemplary damages, there being no evidence that the act was wilful or wanton. *Philadelphia Traction Co. v. Orbann* (Pa.). 432.
- Newsboy selling papers on street car not an employee on or about the road within meaning of Pennsylvania statute. *Philadelphia Traction Co. v. Orbann* (Pa.). 432.
- Passing street car. Passenger thrown from platform and injured, owing to negligence of driver of car on which he was riding and driver of car passing in opposite direction. Instruction as to negligence of the driver of the latter car when there was no testimony of any negligence on his part, *held* erroneous. *Black v. Brooklyn City R. Co.* (N. Y.). 526.
- Place for alighting. Duty of company. Instruction that company is not bound to make landings or provision for reception of passengers where none are expected, ought not to be given without modification to adapt it to circumstances. *Smith v. Central R. & B. Co.* (Ga.). 456.
- Platform: injury to passenger on. Inconsistent findings. 378 *n.*
- Pleading. Allegation in action for injuries caused by company's negligence that plaintiff was a passenger *held* merely redundant and not to defeat his recovery. *Way v. Chicago, etc., R. Co.* (Iowa). 286.
- Pleading. Sufficiency of complaint. Complaint alleging contract to transport plaintiff, but not alleging that point at which accident occurred is between place of departure and destination is sufficient, if it appear that plaintiff was injured while being carried under contract. *International & G. N. R. Co. v. Underwood* (Tex.). 570.
- Presumption of negligence arising from injury sustained by passenger has no application where injuries were received while passenger was passing from station to ferry, and were caused by pushing his hand through glass of swing door. *Hayman v. Pennsylvania R. Co.* (Pa.). 478.
- Presumption of negligence. Statute which declares that in all cases where passengers are injured the presumption shall be against company does not abridge privileges and immunities of a citizen. *Augusta & S. R. Co. v. Randall* (Ga.). 439.
- Previous bad health. Fact that person injured through negligence would have recovered if he had not been in bad health at the time the accident occurred will not preclude recovery if death was not sole result of bad health. *Louisville & N. R. Co. v. Jones* (Ala.). 417.
- Production of ticket. See TICKET.
- Refusal to pay fare. Person getting upon train which does not stop at station for which he has bought ticket, and refusing to pay fare to next station, or to leave train when requested, is a trespasser. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Riding on dangerous place. Consent and authority of servants. 273 *n.*
- Riding on engine. Former employee is charged with notice of rule prohibiting any one but employees from riding on engine, and if he ride

PASSENGER—Continued.

- upon the engine, even at engineer's invitation, he is a trespasser. *Virginia M. R. Co. v. Roach* (Va.). 271.
- Riding on steps and platform of street cars. 544 *n*.
- Right on platform. It is the duty of a passenger standing on platform of a car to go inside when requested to do so by a person having charge. *Graville v. Manhattan R. Co.* (N. Y.). 375.
- Running train past station. It is negligence to run a train without warning at high rate of speed past a station at which another train is discharging passengers. *Robostelli v. New York & H. R. Co.* (C. C.). 515.
- Seat. Company must provide safe place and seats for passengers. 361 *n*.
- Seats. Duty of company. Passenger refused to pay fare unless seat was provided held that he had a right to do so, and did not thereby become a trespasser. *Hardenbergh v. St. Paul, etc., R. Co.* (Minn.). 359.
- Selection of materials. Carrier exercises sufficient care in selection of plan and materials if it selects such as are in use and have been found sufficient. *Pershing v. Chicago, etc., R. Co.* (Iowa). 405.
- Setting down passenger. It is error to instruct jury that company is bound to exercise strictest vigilance in carrying passengers and in setting them down safely at their destination. *Hurt v. St. Louis, etc., R. Co.* (Mo.). 422.
- Sleeping and eating car: passenger on, is not entitled to have his berth made up by porter before porter has finished lunches previously ordered by other passengers. *Pullman P. R. Co. v. Ehrman* (Miss.). 362.
- Sleeping Car Company. See that title.
- Stopping car at dangerous place. Where carrier brings passenger to the place where the train was going, all it is bound to do is to see that he is afforded reasonable immunity from danger. *Smith v. Central R. & B. Co.* (Ga.). 456.
- Stopping train at dangerous place. Illustration used by court in instruction as to stopping train on a trestle over a river held proper. *Smith v. Central R. & B. Co.* (Ga.). 456.
- Subsequent sickness. Instruction. Where there is evidence that passenger received injuries which would entitle him to a recovery, and which caused subsequent sickness, it is error to instruct the jury that they must infer that plaintiff could not recover unless the sickness was caused by it. *Graham v. Burlington, etc., R. Co.* (Minn.). 397.
- Sunday: injuries to passengers travelling on. 396 *n*.
- Sunday law. Massachusetts adjudications as to right of persons travelling on Sunday to recover for negligence of company's servants, will be followed by federal courts in actions arising in that State. *Bucher v. Cheshire R. Co.* (U. S.). 389.
- Sunday law. *Res adjudicata*. Determination of Massachusetts court that errand on which plaintiff was travelling was not one of necessity or charity, held to exclude consideration of that question from jury in federal court, in action after he had become nonsuit in State court. *Bucher v. Cheshire R. Co.* (U. S.). 389.
- Termination of relation. Passenger who has reached his destination and started to cross track not on his way to the station, and is injured while so crossing, has ceased to be a passenger before the accident. *Allerton v. Boston & M. R. Co.* (Mass.). 563.

PASSENGER—Continued.

- Through trains. A railroad may adopt a regulation that one of its through trains shall only stop at certain designated stations. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Ticket. See that title.
- Travelling in caboose. Chairs. Fact that plaintiff was sitting in a chair in the caboose of a train, when stationary seats were provided, and that if he had used such seats he would not have been thrown down and injured, does not show contributory negligence. *Quackenbush v. Chicago & N. W. R. Co.* (Iowa). 545.
- Trespasser. Baggage master has no authority to invite or permit persons to ride on train; such permission cannot create relation of carrier and passenger. *Reary v. Louisville, etc., R. Co.* (La.). 277.
- Trespasser. Company is not liable to person riding on train at invitation of baggage-master for injuries received, unless through negligence of company. *Reary v. Louisville, etc., R. Co.* (La.). 277.
- Trespasser in caboose injured by train being moved in a negligent manner, although engineer or brakeman had no knowledge of his presence, held entitled to recover under Iowa statute. *Way v. Chicago, etc., R. Co.* (Iowa). 286.
- Trespasser on train injured by collision in course of coupling cars; verdict set aside as contrary to instruction although such instruction was erroneous. *Way v. Chicago, etc., R. Co.* (Iowa). 286.
- Trespassers. Railway is not bound to same degree of care in regard to mere strangers unlawfully on its premises that it owes to passengers. *Reary v. Louisville, etc., R. Co.* (La.). 277.
- Unmanageable horses. Evidence of former street car driver held admissible in action in which plaintiff complained of injuries alleged to have been caused by use of. *Dougherty v. Missouri R. Co.* (Mo.). 488.
- Wrong train. If mistake was induced by ticket agent, extra fare paid is an element of damage in addition to such as was occasioned by being carried beyond destination. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Wrong train. Mistake of agent. Person getting on wrong train by mistake and who refuses to pay fare, although able to do so, should leave the train when stopped by the conductor. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.
- Wrong train. Passenger on train that does not stop at station named in his ticket. Expulsion. 307 *n.*

PENALTY.

- Baggage: penalty for refusal to carry. 255 *n.*

PLEADING AND PRACTICE. See NEGLIGENCE ; SURFACE WATERS.

- Argument of counsel. Improper remarks of counsel as a ground for reversal. 75 *n.*
- Argument of counsel. In an action for personal injuries court refuses to set aside a verdict because of certain remarks made by counsel for plaintiff in his argument. *Battishill v. Humphreys* (Mich.) 69.
- Complaint. Amendment to petition for damages for injuries sustained by passenger, concerning character of horses and jerk in starting car,

PLEADING AND PRACTICE—Continued.

- held not to substitute new cause of action. *Dougherty v. Missouri R. Co. (Mo.)*. 488.
- Death of joint contractor.** Under Indiana code the whole right in a joint contract vests in the survivors, and such survivors may maintain an action thereon without joining the representatives of the deceased. *Indiana, etc., R. Co. v. Adamson (Ind.)*. 127.
- Injury at crossing. Variance.** Recovery cannot be had under statute conferring right of action where person is injured at crossing and employees neglected to give signal, when counts are founded upon other statutory provisions. *Allerton v. Boston & M. R. Co. (Mass.)*. 563.
- Injuries. Specification.** Allegation in pleading that plaintiff was "injured in spine, chest, head, etc.," held sufficiently comprehensive to embrace heart disease. *Gulf, etc., R. Co. v. Mannerwitz (Tex.)*. 428.
- Injuries. Supervening disease.** Under allegation that plaintiff was so injured that he suffered great pain, became sick, etc., evidence that he was suffering from Bright's disease, held admissible. *Ohio & M. R. Co., v. Hecht (Ind.)*. 447.
- Injury to passenger. Sufficiency of complaint.** Complaint alleging contract to transport plaintiff, but not alleging that point at which accident occurred is between place of departure and destination is sufficient, if it appear that plaintiff was injured while being carried under contract. *International & G. N. R. Co. v. Underwood (Tex.)*. 570.
- Lease of road.** Railroad has no power to lease its road without statutory authority, and plea by lessor that it had leased the road is not sufficient. *International & G. N. R. Co. (Tex.)*. 570.
- Redundant allegation.** Allegation in action for injuries that plaintiff was a passenger held merely redundant and not to defeat his recovery. *Way v. Chicago, etc., R. Co. (Iowa.)*. 286.
- Sale of road. Personal injuries:** to constitute sufficient defence for, company must not only plead that by virtue of private act (which it should properly refer to), it had sold its road, but must show that it had complied with conditions imposed upon sale. *East Line, etc., R. Co. v. Rushing (Tex.)*. 367.
- Service of process. Foreign corporation.** Service in action against foreign corporation cannot be made on agent whose authority is limited to soliciting business, although he has been employed to compromise the suit. *Maxwell v. Atchison, etc., R. Co. (C. C.)*. 574.
- Service of process on agents of foreign corporation.** 580 *n*.
- Special finding by jury in action for servant's tort** that he was not acting in the course of his employment is a conclusion of law and may be set aside. *Fick v. Chicago, etc., R. Co. (Wis.)*. 378.

POLICE OFFICER. See PASSENGER.

PRACTICE. See PLEADING AND PRACTICE.

PRESIDENT. See OFFICERS.

PROXIMATE CAUSE. See DEATH; PASSENGER.

RAILROAD COMMISSIONERS.

Apportionment of salaries. Under the statute providing that the salaries of the commissioners shall be apportioned among the several railroad companies, "the length" of the road is not the number of miles of rails laid, but the distance between the terminal points. *People v. Chapin* (N. Y.). 136.

RULES AND REGULATIONS.

Freight train: fact that regulation prohibiting carrying passengers on, has been violated does not deprive company of right to enforce the regulation. *Hobbs v. Texas & P. R. Co.* (Ark.). 268.

Freight train. Railway has power to make regulations requiring persons desiring to ride on freight train to be provided with tickets. *Southern Kansas R. Co. v. Hinsdale* (Kan.). 256.

Through trains. A railroad may adopt a regulation that one of its through trains shall only stop at certain designated stations. *Atchison, etc., R. Co. v. Gants* (Kan.). 290.

Tickets for passenger trains. Regulations. 267 *n*.

Ticket. Rule requiring passengers to procure tickets before entering freight train; evidence of non-enforcement. 264 *n*.

SALE OF ROAD.

Private act. Pleading. To constitute defence to action for personal injuries company must plead by proper reference to private act, that by virtue of such act it had sold its road and must show that it had complied with conditions imposed upon the sale. *East Line, etc., R. Co. v. Rushing* (Tex.). 367.

SERVICE OF PROCESS. See PLEADING AND PRACTICE.**SIGNAL.**

Contributory negligence of deceased. Company is not rendered liable for death of trespasser on account of its failure to ring bell, if deceased was guilty of contributory negligence in not paying heed to passing trains. *Guenther v. St. Louis, etc., R. Co.* (Mo.). 47.

Evidence. Where several witnesses who were present state that signals were given and headlight was burning, testimony of witness who lived some distance away that bell was not ringing nor headlight burning, held properly excluded. *Hughes v. Galveston, etc., R. Co.* (Tex.). 66.

Trespassers; ringing of bell and sounding of whistle for. 56 *n*.

SLEEPING CAR COMPANIES.

Baggage; liability of sleeping car company for loss. 219 *n*.

Baggage. Sleeping car company is responsible for its failure to exercise reasonable care whereby a passenger's baggage is stolen. *Pullman P. Car Co. v. Pollock* (Tex.). 217.

Refusal to make up berth. Passenger on a car which is both a sleeping and an eating car is not entitled to have his berth made up before porter has finished lunches previously ordered by other passengers. *Pullman P. R. Co. v. Ehrman* (Miss.). 362.

SPECIAL FINDINGS. See PLEADING AND PRACTICE.

SPECIAL POLICEMAN. See **CONTRACT.**

SPEED.

Negligence. While travelling in an open country no conceivable rate of speed consistent with the safety of passengers is negligence *per se* in the absence of a statute imposing a limit. *Houston v. Vicksburg, etc., R. Co. (La.)*. 76.

No rate of speed is negligence *per se*. 80 *n*.

Statutory limit. An ordinance limiting the rate of speed in passing over crossings does not imply that this rate may not be exceeded between crossings. *Central R. & B. Co. v. Smith (Ga.)*. 1.

STATION. See **PASSENGERS.**

STATUTE.

Negligence. Where a statute expressly enjoins an act, the act is within all degrees of diligence, even the very lowest, and its omission is negligence *per se*. *Central R. & B. Co. v. Smith (Ga.)*. 1.

Omission of statutory duty as affecting a company's liability. 5 *n*.

STATUTE OF LIMITATIONS. See **LIMITATIONS, STATUTE OF.**

**STATUTORY AND CONSTITUTIONAL PROVISIONS CITED
AND CONSTRUED.**

CONSTITUTIONS.

Nebraska.

Constitution of 1875, Art. 1, sec. 21. Eminent domain. Property injuriously affected. 179.

United States.

Art. 14. Abridgment of privileges and immunities. 446.

STATUTES.

Arkansas.

Mansf. Dig. sec. 5474. Restriction upon right to eject passenger. 270.

Georgia.

Code, sec. 3033. Presumption against railway in case of accident. 445.
Code, secs. 3073, 3082. Remote damages. 445.

Iowa.

Code, sec. 1307. Passenger. Liability of carrier notwithstanding contributory negligence. 287, 289.

Massachusetts.

St. 1877, c. 232. Prohibition against travelling on Sunday not a defense to action against carrier. 300.

Pub. Stat. c. 112, sec. 188. Equal terms and facilities for transportation. 358.

STATUTORY AND CONSTITUTIONAL PROVISIONS—Cont.*New York.*

Laws of 1882, c. 53, sec. 13. Railroad commissioners. Apportionment of salaries. 136.

Pennsylvania.

Act of April 4, 1868. Right of persons engaged or employed on or about railroad to recover for injuries. 433.

Texas.

|| Act of 1871. Authorizing East Line & Red River R. Co. to cross or connect with other roads. 369.

United States.

Act of July 25, 1886. Bridge across Missouri River at Kansas City. 157.

Interstate Commerce Act. Cases arising under. Pp. 583-739. 126.

Rev. Stat. sec. 4281. Jewelry in baggage. Notice to carrier. 216.

STREET RAILWAY. See PASSENGERS.

Application of the brake. In an action for injuries, if there is evidence to show that when the brakes are applied the car-wheel will not revolve, plaintiff's boot is admissible to show that car-wheel ran over his foot, and that the brake was not applied. *Hays v. Gainesville St. R. Co. (Tex.)*. 97.

Collision between wagon and horse-car. *Held*, that the case ought to be left to the jury upon the conflicting evidence as to negligence. *North Hudson St. R. Co. v. Isley (N. Y.)*. 94.

Contributory negligence. Person driving on the track and seeing dummy engine in front of him, who does nothing except shout to the engineer, is so dilatory that a nonsuit ought to be entered in an action by him for damages. *Donnelly v. Brooklyn City R. Co. (N. Y.)*. 103.

Duty of carrier. The exercise of utmost foresight, knowledge, and care is required of all carriers of passengers, and not merely of railroads operated by steam. *Dougherty v. Missouri R. Co. (Mo.)*. 488.

Other vehicles on track. Street-cars have a right to pass upon the track without hindrance, but when the track is not used for the passage of the cars other vehicles may use it, and when the driver of such vehicle meets approaching car he is bound to leave the track in time to give free passage. *North Hudson St. R. Co. v. Isley (N. Y.)*. 94.

Other vehicles on track. What will be deemed due diligence in removing a vehicle from the track of a street railway when a horse-car is approaching is a question for the jury. *North Hudson St. R. Co. v. Ilsev (N. Y.)*. 94.

Other vehicles on track. Use of street-car tracks by other vehicles. 96 n.

Passengers: injuries to. The cases concerning injuries to passengers riding on street-cars are indexed under the heading PASSENGERS.

Personal injuries. Evidence. In an action by a boy against a street railway for damages for personal injuries, evidence that other boys had been in the habit of jumping on cars is inadmissible. *Hays v. Gainesville St. R. Co. (Tex.)*. 97.

Personal injury. Instruction that plaintiff is entitled to recover if he

STREET RAILWAY—Continued.

was injured through the carelessness of the car-driver, or by the wilful or intentional act of such driver, *held*, erroneous. *Hays v. Gainesville St. R. Co. (Tex.)*. 97.

Unskilful employee. In an action against a street railway company for personal injuries caused by driver's negligence, instruction as to failure of defendant to employ prudent drivers, *held*, argumentative and improper. *Hays v. Gainesville St. R. Co., (Tex.)*. 97.

SUNDAY.

Passengers: injuries to, travelling on Sunday. 396 *n*.

Passengers. Personal injuries. Massachusetts adjudications as to right of persons travelling on Sunday to recover for negligence of company's servants, will be followed by federal courts in actions arising in that State. *Bucher v. Cheshire R. Co. (U. S.)*. 389.

Passenger. *Res adjudicata*. Determination of supreme court of Massachusetts that errand on which plaintiff was travelling was not one of necessity or charity held to exclude consideration of that question from jury in federal court, in action after he had become nonsuit in State court. *Bucher v. Cheshire R. Co. (U. S.)*. 389.

SURFACE WATER.

Action for damages. Limitation, 157 *n*.

Alteration of drains. If a railroad alters an accustomed drain the substituted outlet must be sufficient for ordinary rainfalls but need not be constructed in view of extraordinary occurrences. *Philadelphia, etc., R. Co. v. Davis (Md.)*. 143.

Civil law rule. 150 *n*.

Common-law rule. 149 *n*.

Conflicting decisions. 151 *n*.

Crops on right of way. In an action for flooding crops plaintiff may be asked how much of crop damaged was planted within 100 feet of track, where defendant has pleaded that injury to crops on right of way could not sustain an action. *Waldrop v. Greenville, etc., R. Co. (S. C.)*. 204.

Culverts. Where a railroad constructs an embankment it is bound to provide culverts so as to allow the escape of waters through them in times of high waters as well as low. *Ohio & M. R. Co. v. Washter (Ill.)*. 194.

Damages for loss of pasture. Instruction that jury might find what was the value for one year and then take the proportionate rate for the length of time which plaintiff was deprived of his pasture is erroneous, where it appears that the value varied at different seasons of the year. *Sabine & E. T. R. Co. v. Broussard (Tex.)*. 199.

Death of stock. In an action for the death of stock caused by a flood, a witness who has stated his means of information as to the loss of the stock may give an opinion as to the number of dead animals. *Sabine & E. T. R. Co. v. Broussard (Tex.)*. 199.

Discharged through ditch. A railroad has no right by means of a ditch to turn surface waters accumulating upon its land upon the land of another where they would not otherwise go. *Olson v. St. Paul, etc., R. Co. (Minn.)*. 152.

Ditch. Where a company forms a ditch across land under a revocable verbal license having no easement it is not obliged to continue to keep the ditch in use and is not liable for damages to a land-owner's

SURFACE WATER—Continued.

- crops caused by the act of closing the ditch. *Olson v. St. Paul, etc., R. Co. (Minn.)*. 154.
- Evidence of damage.** In an action for injuries to crops caused by defective culvert a non-suit is properly granted if plaintiff fails to introduce evidence as to the amount of his loss, and an averment in the answer that the plaintiff had agreed to take \$5 in satisfaction is not sufficient to send case to the jury. *Waldrop v. Greenville, etc., R. Co. (S. Car.)*. 204.
- Flood.** Damages for injury to pasture are not limited to the value of grass actually destroyed, but it may be shown that the pasture was rendered incapable of producing grass. *Sabine & E. T. R. Co. v. Broussard. (Tex.)*. 199.
- Floods. Pleading.** In an action for injuries to land from floods caused by negligent construction, allegations of injuries to adjacent land not belonging to plaintiff are properly stricken out. *Sabine & E. T. R. Co. v. Broussard. (Tex.)*. 199.
- Injury to crops.** Where plaintiff alleges that the crops were owned by himself and his tenant and that he had obtained his tenant's claim for damages, plaintiff's recovery is limited to such crops as the tenant at the time of the destruction had an interest in, and the evidence of injury must be confined to such crops. *Gulf, etc., R. Co. v. McGowan. (Tex.)*. 210.
- In New Jersey.** 151 *n.*
- Instruction.** Extraordinary rains. Where the jury is informed that the defendant would not be liable if the overflow resulted from it, is not necessary to repeat such instruction in several paragraphs bearing upon defendant's liability. *Sabine & E. T. R. Co. v. Broussard. (Tex.)*. 199.
- Insufficient culvert.** Declarations of section-master concerning sufficiency of culvert not falling within the scope of his duties are inadmissible in action for overflow. *Waldrop v. Greenville, etc., R. Co. (S. Car.)*. 204.
- Liability for insufficient culvert.** A railroad by the payment of compensation for injuries caused by the construction of its road-bed does not escape liability for damages caused by the construction of an insufficient culvert. *Ohio & M. R. Co. v. Washter. (Ill.)*. 194.
- Modified doctrine.** 151 *n.*
- Obstruction by lower proprietor.** Lower proprietor cannot obstruct flow across his land except where there is a necessity to protect his property and there is no reasonable way of preventing the injury. *Waldrop v. Greenville, etc., R. Co. (S. Car.)*. 204.
- Obstruction of flow.** The owner of upper land has a right to the uninterrupted on flowage, and a lower proprietor has no right to arrest such waters and accumulate them upon the property of his neighbor. *Philadelphia, etc., R. Co. v. Davis (Md.)*. 143.
- Ownership of land.** In an action for flooding lands in consequence of the stopping up of a culvert the complaint is sufficient where some of the acts charged are alleged to have occurred since plaintiff became the owner of the land. *Terre Haute & I. R. Co. (Ind.)*. 212.
- Surface waters.** 148 *n.*
- Texas statutory provisions.** 151 *n.*
- West Virginia: dicta obiter in.** 151 *n.*

THROUGH TRAINS. See PASSENGERS.

TICKET.

- Commutation ticket. Coupons. Stipulation on sale of commutation tickets that coupon shall not be valid unless detached in presence of, or by conductor, is valid. *Boston & M. R. Co. v. Chipman* (Mass.). 336.
- Commutation ticket. Coupons void if detached, reasonable condition. 338 *n*.
- Commutation ticket: ejectment for failure to exhibit. 338 *n*.
- Commutation ticket. Refusal to allow conductor to detach coupons. 338 *n*.
- Commutation ticket. Validity. If a person in good faith presents commutation ticket which was issued to another, and is not transferable, and he is carried as a passenger, he is entitled to the rights of a passenger. *Robostelli v. New York & H. R. Co.* (C. C.). 515.
- Conditions in ticket requiring it to be stamped and signed by the purchaser. 344 *n*.
- Condition requiring signature. Waiver. 350 *n*.
- Discrimination. A railroad may charge more to those paying fare on train than it charges for tickets. *State v. Hungerford* (Minn.). 265.
- Drawing-room car: stipulation in free pass exempting company from liability not abrogated by purchase of ticket for. *Ulrich v. New York, etc., R. Co.* (N. Y.). 350.
- Ejection of passenger for refusal to pay full fare. 268 *n*.
- Excursion tickets. Contract for sale. In action for breach of contract to issue excursion tickets, testimony of sub-purchaser that he had bought a large number of tickets from plaintiff at advanced price is admissible. *Houston, etc., R. Co. v. Hill* (Tex.). 363.
- Excursion ticket. Contract for sale. Person who has contract for issue of excursion tickets, and has resold large number, can recover full amount of damages caused by breach of contract without joining sub-purchaser. *Houston, etc., R. Co. v. Hill* (Tex.). 363.
- Excursion tickets. Contract. Insufficient tender. In action for breach of contract to issue large number of excursion tickets, proof of tender of fifteen tickets will not have effect of reducing plaintiff's claim as to tickets tendered to difference between contract rate and regular fare. *Houston, etc., R. Co. v. Hill* (Tex.). 363.
- Excursion tickets. Measure of damages in action for breach of contract to issue is net profit which would have been realized by the plaintiff. *Houston, etc., R. Co. v. Hill* (Tex.). 363.
- Facilities to procure. Where possession of ticket is essential to enable passenger to ride on freight train, company must furnish convenient facilities for purchase of tickets. *Southern Kansas R. Co. v. Hinsdale* (Kan.). 256.
- Failure to procure. Freight train. Announcement of rule requiring passengers on freight train to procure tickets held to give it sufficient publicity, and passenger could be expelled for non-compliance. *Southern Kansas R. Co. v. Hinsdale* (Kan.). 256.
- Freight train: notice of change requiring procuring of tickets before entering. 264 *n*.
- Freight train: procuring ticket before entering. 264 *n*.
- Limited tickets. 349 *n*.
- Limited tickets. Expiration of time limited. 349 *n*.
- Limited ticket. Identification of holder. Where passenger who buys limited ticket over two connecting lines is not identified at the office of the company connecting with the line which sold the ticket, owing to the absence of the agent, he cannot maintain an action

TICKET—Continued.

- against the road selling the ticket on account of his expulsion by the conductor on one of the trains of such road. *Mosher v. St. Louis, etc., R. Co. (U. S.)*. 339.
- Limited ticket. Stamping. Waiver. Where passenger holding limited ticket had it stamped at point other than that named in ticket, evidence held admissible to show that agent at that point was authorized to waive condition that ticket should be stamped at point named therein. *Taylor v. Seaboard & R. R. Co. (N. Car.)*. 344.
- Lost ticket: expulsion of passenger for failure to produce. 336 *n*.
- Passenger trains: tickets for. Regulations. 267 *n*.
- Production of ticket. Conductor is bound to wait reasonable time to enable passenger to produce ticket; what is reasonable time therefor is question for jury. *International, etc., R. Co. v. Wilkes (Tex.)*. 331.
- Production of ticket. Reasonable time. Evidence held to show that conductor who expelled passenger who asked for time to find his ticket did not wait a reasonable time for the production of the ticket. *International, etc., R. Co. v. Wilkes (Tex.)*. 331.
- Reasonable opportunity to obtain ticket. 264 *n*.
- Reasonable opportunity to procure. Right of carrier to discriminate against those not buying tickets is conditioned upon its giving reasonable opportunity to purchase tickets. How long ticket office is required to be kept open. *State v. Hungerford (Minn.)*. 265.
- Reasonable opportunity to procure ticket. 267 *n*.
- Reasonable time. Conductor must give passenger reasonable time to find ticket. 336 *n*.
- Rule requiring passengers to procure tickets before entering freight train: evidence of non-enforcement of. 274 *n*.
- Sufficiency of effort to procure ticket. 264 *n*.
- Wrong train. Person on train cannot insist that he shall be permitted to ride without proper ticket for that train in violation of company's regulations. *Atchison, etc., R. Co. v. Gants (Kan.)*. 290.

TRESPASSER. See PASSENGERS; SPEED; STREET RAILWAY.

- Acquiescence in crossing. 20 *n*.
- Active and passive negligence. 21 *n*.
- Authority of servants running switch engine. Evidence held sufficient to enable jury to infer that the engine was employed in taking certain employees home for supper with the knowledge and acquiescence of defendant. *Reilly v. Hannibal & St. Jo. R. Co. (Mo.)*. 81.
- Children trespassing on railroad track. 87 *n*.
- Child on track. Evidence held sufficient to justify finding of gross negligence on part of the defendant. *Battishill v. Humphreys (Mich.)*. 69.
- Conflicting testimony. In an action for the death of a person while walking over a trestle, where the evidence as to negligence and contributory negligence was conflicting, *held*, that there was sufficient evidence of negligence to justify the refusal of an instruction that if the jury believed the evidence introduced by the plaintiff, and the uncontradicted evidence introduced by the defendant, that they would find that deceased was guilty of contributory negligence. *Troy v. Cape Fear, etc., R. Co. (N. Car.)*. 13.
- Contributory negligence. If a person remains upon the track until he is injured by an approaching train which he might have seen and

TRESPASSER—Continued.

- heard, his contributory negligence will defeat a recovery. *Hughes v. Galveston, etc., R. Co. (Tex.)*. 66.
- Contributory negligence. If by the exercise of reasonable care an accident might have been avoided the company is liable for injuries sustained by a trespasser although he was guilty of contributory negligence. *Troy v. Cape Fear, etc., R. Co. (N. Car.)*. 13.
- Contributory negligence: if deceased was guilty of, there can be no recovery unless defendant's servants, after discovering him, or after they might have discovered him failed to use proper means to avoid injuring him. *Guenther v. St. Louis, etc., R. Co. (Mo.)*. 47.
- Contributory negligence. It is contributory negligence for a person who had passed the point where he was struck daily, to step upon the track with the view unobstructed and continue to walk on without looking or listening. *Guenther v. St. Louis, etc., R. Co. (Mo.)*. 47.
- Contributory negligence. Where deceased, as soon as she heard the whistle sound, commenced to run along track, and the train struck her and killed her, *held*, that the want of ordinary care on the part of the deceased was the proximate cause of her death. *Houston v. Vicksburg, etc., R. Co. (La.)*. 76.
- Contributory negligence. Where those in charge of a train are guilty of reckless negligence, question of contributory negligence does not arise if the accident might have been prevented by the exercise of reasonable diligence. *Battishill v. Humphreys (Mich.)*. 69.
- Deaf mute. If the engineer gives signals he has a right to expect the trespasser to leave the track, and the company will not be liable for his death, though the engineer when he first saw him had time to stop the train and the trespasser was a deaf mute. *Nichols v. Louisville & N. R. Co. (Ky.)*. 37.
- Deaf mute, infants, etc. 56 *n.*
- Deaf mute: injury to. 38 *n.*
- Deafness. Notice to conductor of deafness of plaintiff who was traveling along the track; evidence of, held inadmissible as plaintiff's own evidence established contributory negligence on his part. *Kennedy v. Denver, etc., R. Co. (Col.)*. 40.
- Deaf person walking along track. 38 *n.*
- Duty of company. If the person who is injured negligently trespassed on the track and nothing contravened to relieve the act of its culpability, his negligence contributed directly to his injury, and the company did not owe him the duty of keeping a lookout. *Galveston, etc., R. Co. v. Ryon (Tex.)*. 30.
- Duty of company. The company is liable if it discovers a trespasser on the track and fails to use reasonable diligence to prevent the train from running over him. *Galveston, etc., R. Co. v. Ryon (Tex.)*. 30.
- Duty of engineer. It is the duty of the engineer to keep a lookout to warn trespassers and to use ordinary care to prevent any accident. *Virginia Midland R. Co. v. White (Va.)*. 22.
- Evidence. Signals. Where several witnesses who were present state that signals were given, and headlight was burning, testimony of witness who lived some distance away, that the bell was not ringing nor headlight burning, *held*, properly excluded. *Hughes v. Galveston, etc., R. Co. (Tex.)*. 66.
- Failure to look and listen. 58 *n.*
- Failure to look and listen held to be the proximate cause of the death

TRESPASSER—Continued.

of a trespasser who, after walking alongside of the track, attempted to cross without looking and listening, even though engineer might have been negligent in failing to ring the bell. *Schilling v. Chicago, etc., R. Co. (Wis.)*. 60.

Gross carelessness. In an action for killing a child who had wandered on to track, *held*, that the facts were sufficient to show that the killing occurred through the gross negligence of those running the locomotive. *Reilly v. Hannibal & St. Jo. R. Co. (Mo.)*. 81.

Gross negligence. Walking along track in the dark, not knowing whether train is due or not, and without looking or listening, is gross negligence. *Central R. & B. Co. v. Smith (Ga.)*. 1.

Injury to trespassers on track: liability for. 5 *n.*

Intoxication. In action by a widow to recover for the death of her husband, *held*, that the admission in evidence of plaintiff's remark "that he always went on the track when drunk," was a harmless error. *Hughes v. Galveston, etc., R. Co. (Tex.)*. 66.

Licensee: duty of company to, 20 *n.*

Licensees. Where the company has allowed its track to be used for a number of years, a person using the track is a licensee, and the company is bound to exercise prudence towards him. *Virginia Midland R. Co. v. White (Va.)*. 22.

Mental condition. The fact that the person killed was rendered mentally incapable of saving himself by his appalling situation will not relieve him from the imputation of contributory negligence. *Houston v. Vicksburg, etc., R. Co. (La.)*. 76.

Minor crossing track. Where there is evidence to show that no lookout was kept, and it is not claimed that any warning was given, question whether plaintiff used due care, or whether accident was caused by defendant's negligence, is properly left to jury. *Houston, etc., R. Co. v. Boozer (Tex.)*. 63.

Pennsylvania doctrine. 58 *n.*

Permission of the company. A railroad company having by long consent allowed the public to pass along a trestle, persons doing so are not trespassers. *Troy v. Cape Fear, etc., R. Co. (N. Car.)*. 13.

Proximate cause. Where deceased while walking along track was run over by yard engine running at excessive speed and giving no signal, *held* that the negligence of the company was the proximate cause of the injury, and that plaintiff was entitled to recover. *Virginia Midland R. Co. v. White (Va.)*. 22.

Recovery under statute. Under Georgia statute giving a right to recover partial damages where person injured has been guilty of contributory negligence, plaintiff cannot recover if he has trespassed upon track and been grossly negligent. *Central R. & B. Co. v. Smith (Ga.)*. 1.

Ring of bell and sounding of whistle. 56 *n.*

Rule under Kentucky and Tennessee statutes. 58 *n.*

Signal. Company is not rendered liable for death of trespasser on accounts of its failure to ring bell if deceased was guilty of contributory negligence in not paying heed to passing trains. *Guenther v. St. Louis, etc., R. Co. (Mo.)*. 47.

Speed. No rate of speed is negligence *per se*. 80 *n.*

Speed. Statutory limit. Where an ordinance limits the rate of speed in passing over crossings it is error to instruct the jury that if the rate of speed exceeded the limit, that would be negligence if the injury

TRESPASSER—Continued.

was caused to plaintiff between crossings. *Central R. & B. Co. v. Smith (Ga.)*. 1.

Trespasser must guard not only against negligence which he might discover in time to avoid the consequence, but also against ordinary danger of their being negligence which he might not discover until too late. *Central R. & B. Co. v. Smith (Ga.)*. 1.

Trespassers on railway track. 55 *n.*

Use of right of way as foot-path. 20 *n.*

TURN-TABLE. See CHILDREN.**VENUE.**

Louisiana code. Action may be brought to recover damages for wrongful killing in the parish where the damage was done. *Houston v. Vicksburg, etc., R. Co. (La.)*. 76.

WATER. See BRIDGE; SURFACE WATERS.

Continuing nuisance. Where the erection of a bridge causing overflows is a continuing nuisance, in consequence of which a recovery is limited to damages accrued, a judgment in one action is no bar to a second action. *Omaha, etc., R. Co. v. Standen (Neb.)*. 179.

Flooding. Construction of road. After the construction of an embankment, a wind storm carried the water over the land as far as the embankment, where its flow was impeded and it was dammed back. *Held*, that the engineer having been informed of the danger of constructing a solid embankment, the company was liable for injuries caused. *Sabine & E. T. R. Co. v. Wood (Tex.)*. 190.

Injury to crops. Variance. In an action for injury to crops where the acts of negligence alleged are the construction of the road-bed adjoining the lands, evidence that the road was negligently constructed at a point several miles above plaintiff's farm, which caused the water to flow on to plaintiff's land, is inadmissible. *Gulf, etc., R. Co. v. McGowan (Tex.)*. 210.

Overflow. Bridge embankment. Where an embankment as an approach to a bridge across a creek is constructed, the company must leave a sufficient opening for the water flowing along the creek so as to prevent injury to adjacent lands, but is not bound to provide against damages caused by extraordinary floods. *Gulf, etc., R. Co. v. Pool (Tex.)*. 187.

Overflow. Defective bridge. Where a bridge is so constructed as to form an unlawful obstruction and cause an overflow of the river, no right of action accrues to the land owner until he sustains an actual injury caused by such obstruction. *Omaha, etc., R. Co. v. Standen (Neb.)*. 179.

Overflow. Measure of damages. In an action for injury to crops through an overflow, the measure of damages is the market value of the crops at the time they were destroyed, and the injuries to the land. *Gulf, etc., R. Co. v. Pool (Tex.)*. 187.

Overflow on land: measure of damages for. 196 *n.*

Overflow. *Res adjudicata*. In an action for overflowing land, caused by the improper construction of bridge, a judgment in a former suit is no bar to a recovery for injuries subsequently sustained. *Chicago, etc., R. Co. v. Schaffer (Ill.)*. 174.

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